

1                   **IN THE UNITED STATES DISTRICT COURT**  
2                   **FOR THE SOUTHERN DISTRICT OF TEXAS**  
                  **HOUSTON DIVISION**

3 UNITED STATES OF AMERICA                   )           NO. 4:21-CR-09  
  )  
4    )  
5 VS.    )           Houston, Texas  
  )           1:08 p.m. to 7:16 p.m.  
  )  
6 ROBERT T. BROCKMAN                        )           NOVEMBER 22, 2021

7  
8 \*\*\*\*\*

9                   **COMPETENCY HEARING**

10                   **AFTERNOON SESSION**

11                   **BEFORE THE HONORABLE GEORGE C. HANKS, JR.**

12                   **UNITED STATES DISTRICT JUDGE**

13                   **DAY 6**

14  
15 \*\*\*\*\*

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FRANK GUTIERREZ - DIRECT BY MR. VARNADO

**P R O C E E D I N G S**

NOVEMBER 22, 2021

(1:08 p.m. to 7:16 p.m.)

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12:42:33

THE CASE MANAGER: All rise.

THE COURT: Please be seated, everyone.

Mr. Varnado, you may call your next witness.

01:08:56

MR. VARNADO: Thank you, Your Honor. The defense calls Frank Gutierrez.

THE COURT: Okay. Mr. Gutierrez, if you can step forward, sir, and be sworn.

**(Witness sworn.)**

THE WITNESS: Yes, sir, I do.

01:09:10

THE COURT: Please take the stand, sir. You may proceed whenever you're ready.

MR. VARNADO: Thank you, Your Honor.

**FRANK GUTIERREZ,**

duly sworn, testified as follows:

01:09:23

**DIRECT EXAMINATION**

BY MR. VARNADO:

**Q.** Could you please state your name and spell your last name for the court reporter.

**A.** Yes, sir. Frank, last name is Gutierrez,

01:09:32

G-U-T-I-E-R-R-E-Z.

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 Q. And how old are you, Mr. Gutierrez?

2 A. 62.

3 Q. And what city do you currently live in?

4 A. Houston, Texas.

01:09:38 5 Q. And how long have you lived in Houston?

6 A. All my life.

7 Q. And what is your current occupation?

8 A. Healthcare provider --

9 Q. Okay.

01:09:47 10 A. -- home care.

11 Q. And how long have you worked in home healthcare?

12 A. Around 15 years.

13 Q. Now, do you have any medical degrees?

14 A. No, sir.

01:09:56 15 Q. Do you have any professional medical training?

16 A. No, sir.

17 Q. Are you a licensed medical professional in any way?

18 A. No, sir.

01:10:09 19 Q. Have you done anything on your own to learn about  
20 dealing with patients who have Parkinson's disease?

21 A. Yes. I have gone to some seminars. I have also gone  
22 to HAPS, which is Houston Association for Parkinson's, and  
23 they have a lot of people that work -- that have PT, OT,  
24 and they have -- provide services for free for people that  
01:10:29 25 have Parkinson's, and that's where I go, and I learn a lot

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 from them. They teach you and everything.

2 Q. Okay.

3 A. Yes.

01:10:39

4 Q. What about attending doctor visits with patients that  
5 you have taken care of, in addition to Mr. Brockman?

6 A. Yes. I have learned a lot from Dr. Jankovic. I've  
7 worked -- been with him for about six years -- five years.  
8 Five years.

01:10:52

9 Q. Let me pause for just a moment there. Is that in  
10 connection with your care for Mr. Brockman or someone  
11 else?

12 A. Someone -- someone else, yes. And then  
13 Dr. Willerson, also, from St. Luke's, cardiologist, which  
14 I was with him for about six years, yes.

01:11:06

15 Q. So -- and we will talk about some of the additional  
16 people that you have helped in addition to Mr. Brockman --

17 A. Yes.

18 Q. -- in just a little bit.

01:11:14

19 So, in terms of your employment, do you  
20 work for a home healthcare company?

21 A. Yes, sir.

22 Q. What's the name of that company?

23 A. Texans Home Care.

01:11:22

24 Q. All right. And is that -- who is the patient that  
25 you're currently working with right now?

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 **A.** Mr. Robert Brockman.

2 **Q.** And how long have you worked with Mr. Brockman?

3 **A.** Right now, it's seven months. Seven months.

4 **Q.** So when did you start? What's the month?

01:11:36 5 **A.** April the 15th.

6 **Q.** Of this year?

7 **A.** Of this year, yes, sir.

8 **Q.** And do you know why your services were sought in  
9 April of this year with respect to Mr. Brockman?

01:11:47 10 **A.** I spent a lot of time with the patient. I am usually  
11 the one that takes care of him 12 days, 12 hours a day  
12 straight, and I get two days off. And, so, it's 12 and  
13 two, 12 and two.

14 **Q.** Okay. And I want to just ask if you knew -- had  
01:12:04 15 anything happened to Mr. Brockman prior to you being hired  
16 to provide personal care for him?

17 **A.** Yes. I was told by his wife, Ms. Brockman, when we  
18 had the interview to go talk to her about care, that he  
19 was -- had been hospitalized in March for an infection,  
01:12:27 20 and he had been very ill and, so, he needed assistance at  
21 home. And -- and was asking about me, and we told them I  
22 had experience with Parkinson's people, or patients. And,  
23 so, yes.

24 **Q.** Okay. And we will cover that.

01:12:43 25 **A.** Yes.

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 Q. Are you a little bit nervous today?

2 A. Yeah. I never done this before.

3 Q. You're doing fine.

4 A. Okay.

01:12:48 5 Q. So, just take a deep breath.

6 We will talk about your schedule in more  
7 detail, but I think since you mentioned it -- you said it  
8 was 12 days, 12 hours a day, and then two days off?

9 A. Yes.

01:13:01 10 Q. And what time of day are you typically assisting  
11 Mr. Brockman?

12 A. 7:00 in the morning until 7:00 p.m. at night, and  
13 maybe sometimes a little longer, depending how long the  
14 night caregiver -- because if he has problems or  
01:13:14 15 something, he's running late, I stay there until he gets  
16 there.

17 Q. Okay. And, so, does somebody else provide care in  
18 the overnight hours for Mr. Brockman?

19 A. Yes. Yes.

01:13:22 20 Q. Is that someone else who works with your same  
21 company?

22 A. Yes.

23 Q. The same company you work for?

24 A. Right.

01:13:27 25 Q. Okay.



FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 A. Right.

2 Q. Now -- so, presently, you are taking care of just one  
3 person and -- Mr. Brockman?

4 A. Yes. Yes.

01:13:35 5 Q. And have you done that before, cared for somebody  
6 full-time, just one individual?

7 A. Yes. Yes.

8 Q. How -- give us an estimate of how many people you  
9 have done that for over your 15-year career.

01:13:47 10 A. I had two other -- two other patients, and I had one  
11 that I worked full-time, but, also, I had -- the days -- I  
12 had a little bit more days off. I'd take care every other  
13 weekend on another patient that had Parkinson's.

14 Q. So that was my next question.

01:14:06 15 A. Yes.

16 Q. For any of these individuals that you provided care  
17 for previously, did any of them have Parkinson's?

18 A. Yes.

19 Q. How many?

01:14:14 20 A. Two of them. Two other patients, yes.

21 Q. And was one of those patients somebody that you cared  
22 for over a five-year period?

23 A. Yes. Yes.

01:14:25 24 Q. And did that person have dementia as well as  
25 Parkinson's?

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 **A.** Yes.

2 **Q.** Okay. And do you -- when you provide care in this  
3 manner, on an individualized basis, do you typically stay  
4 and assist that person until they pass away?

01:14:39 5 **A.** I do.

6 **Q.** Do you go directly from one patient to the next or do  
7 you take some time off?

8 **A.** No. I -- I usually take about a month off.

9 **Q.** And why is that?

01:14:49 10 **A.** You spend so much time with them and you become part  
11 of their family, and they really need your help, and they  
12 depend on you every day. Their day doesn't start until I  
13 get there and get them out of bed. So, yeah, it  
14 takes something out of me, and I can't really help another  
01:15:15 15 patient until at least I get ahold of myself. So, I take  
16 about a month before I get another patient.

17 **Q.** Okay. All right. I'm sorry, Mr. Gutierrez.

18 MR. VARNADO: If I can approach, briefly, Your  
19 Honor.

01:15:26 20 THE COURT: Yes.

21 THE WITNESS: Oh. Thank you.

22 BY MR. VARNADO:

23 **Q.** So, as you have been engaged in this work, have you  
24 had any difficulty finding another job, you know, if one  
01:15:43 25 of your patients passes away?

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 **A.** No, sir. Not at all.

2 **Q.** Is it fair to say that here in Houston your services  
3 are in high demand?

4 **A.** Yes.

01:15:51 5 **Q.** Have you actually turned people down who have tried  
6 to hire you in the past?

7 **A.** Yes, I have.

8 **Q.** And what would be the reason for that?

9 **A.** Because I don't have enough time to be able to take  
01:16:04 10 care of them, you know, certain -- Like one patient I had  
11 before, I was able -- I had a little time. So, that's why  
12 I had a part-time one and the other one. This was two a  
13 week -- Every other weekend, that one, I had a little bit  
14 of time for him. But, with the other ones, I really  
01:16:19 15 didn't have any more time. Even with Mr. Brockman, I just  
16 don't have time.

17 **Q.** Now, are you paid a monthly salary or an hourly  
18 salary?

19 **A.** Hour salary.

01:16:26 20 **Q.** And what is the hourly rate that you are paid?

21 **A.** \$17 an hour.

22 **Q.** Okay. Now, do you have any sort of side agreement  
23 with the Brockmans where you get paid additional money  
24 beyond what we just talked about?

01:16:36 25 **A.** No, sir.

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 Q. Okay. I would like to see if you can recall the  
2 first time that you met Mr. Brockman. Do you recall  
3 approximately around, you know, what month and year that  
4 was?

01:16:46

5 A. It was April the 14 -- I believe April 14th of this  
6 month -- of this year, I mean. And I had an interview  
7 with his wife first, me and my supervisor from the  
8 company. And we were talking. And then as I was talking,  
9 I noticed Mr. Brockman coming in, because he heard us

01:17:05

10 talking and he walked in. And, so, I usually try not to  
11 really focus on them. I kind of look on the side because  
12 I want to catch them to see what -- how they are in their  
13 state, you know, and see how bad -- how serious their  
14 Parkinson's are. And I could see that his walking and his  
15 balance wasn't that good, and he was kind of hunched over  
16 and stuff. That kind of seems the similarities that I  
17 have seen in Parkinson's. So, yeah.

01:17:20

18 Q. And was your prior experience with another person who  
19 had Parkinson's one of the reasons your supervisor thought  
20 you would be appropriate for this assignment?

01:17:34

21 A. Yes. Yes.

22 Q. And during that first meeting were you able to  
23 observe Mr. Brockman?

24 A. Yes. I was able to look at him and -- and I could  
25 tell, too, in his talking a little bit, from his -- you

01:17:48

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 know, when he was trying to talk, that it wasn't really  
2 quite -- I couldn't make out really what he was saying,  
3 and his voice was somewhat low, like usually what happens  
4 with Parkinson's.

01:18:01

5 **Q.** So, I want to ask you some questions about a typical  
6 day for you in caring for Mr. Brockman, and let me start  
7 by first: Do you, as part of your work for the home  
8 healthcare company, prepare a daily log of some sort  
9 recording, at least, some of your activities during the  
10 day?

01:18:17

11 **A.** Yes. We have a sheet there that -- you know, just  
12 something that I normally even do -- I do, is I fill it  
13 out and just put whatever I can, when I can, because I am  
14 usually a lot with the patient, so --

01:18:30

15 **Q.** Is that log intended to cover all of your  
16 observations throughout the day?

17 **A.** No. No.

18 **Q.** What is the primary purpose of the logs, from your  
19 perspective?

01:18:41

20 **A.** Just a little bit idea to make sure that it shows  
21 that we gave him his meds, and that he -- how much he has  
22 been eating, because eating is very important with  
23 Parkinson's patients because they tend to lose a lot of  
24 weight. And, so, if we start seeing some of that, that  
25 could kind of indicate we need to keep an eye, you know.

01:18:56

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 Q. And if we were to look at some of those reports, from  
2 time to time are there references to Mr. Brockman's --

3 A. Uh-huh.

4 Q. -- "confusion" in those reports?

01:19:06 5 A. Yes. Yes.

6 Q. That word?

7 A. Yes.

8 Q. Now, if we were to look at a report and it doesn't  
9 have the word "confusion" in it, does that mean that

01:19:13 10 Mr. Brockman didn't show any confusion that day or --

11 A. No. No.

12 Q. So, it's not meant to record everything that  
13 happens --

14 A. Right.

01:19:20 15 Q. -- in a single day?

16 A. Right.

17 Q. So, again, turning to a typical day in your care for  
18 Mr. Brockman, let's just start with the first thing in the  
19 morning. What's the first thing that happens when you

01:19:30 20 arrive at Mr. Brockman's house at 7:00?

21 A. When I come in, I usually talk to the night  
22 caregiver, kind of report a little bit, see what -- how  
23 was his night. You know, did he sleep good? Did he have  
24 problems with anything?

01:19:43 25 And then, after that, I walk into their

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 bedroom and I will say good morning to them. And then  
2 I'll ask Mr. Brockman, "How you doing?" You know, "How  
3 are you feeling today?" and "Did you sleep good?"

01:19:56

4 And then I'll determine where to start  
5 from there. The reason I say that is because it could be  
6 like he says, "Well, I had" -- "my back has been bothering  
7 me right now." And, so, if his back is bothering him, I  
8 want to put him some lotion, cream, that's for -- and I  
9 have a little massager in my bag that I'll massage him to  
10 kind of help him a little bit.

01:20:09

11 And then I'll go to do stretching his  
12 legs. I usually want to stretch them out a little bit,  
13 their legs and arms, so, that way, they could be a little  
14 bit looser to start the day when they get up.

01:20:20

15 **Q.** Okay.

01:20:30

16 **A.** And then I'll get them up in the bed, but I usually  
17 wait a little bit. I don't rush them up, because if you  
18 rush them too quick they have a tendency -- they could  
19 fall. So, you've got to give them a little time to sit  
20 there on the edge, and then I'll tell him, "Are you ready,  
21 Mr. Brockman?" Then he'll get up. "Do you want to go to  
22 the bathroom?"

23 **Q.** So, can Mr. Brockman get out of bed on his own or  
24 does he require your assistance?

01:20:40

25 **A.** He requires my assistance.

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 Q. Then, after you're up and out of bed and going to the  
2 bathroom, does Mr. Brockman require your assistance in  
3 that regard also?

01:20:50

4 A. Yes. Most of the time -- a lot of times we will go  
5 straight to the bathroom and I'll help him sit there. And  
6 then after he's done, I help him to get up, or whatever,  
7 because I need to -- I need to take -- clean him and that.

8 Then we start to put his robe on, and then  
9 we will go out to the kitchen to have his breakfast.

01:21:06

10 Q. And where Mr. Brockman lives now, is he -- is his  
11 bedroom on the same floor as the kitchen?

12 A. Yes. Yes. We try to keep everything simple, so yes.

13 Q. And, so, are you -- is your help needed to get him  
14 from the bathroom into the kitchen?

01:21:21

15 A. Yes. Yes. We have a -- sometimes his -- I look  
16 at -- what I do is I look at his walking, and if his feet,  
17 steppings, are not proper, or is crisscrossing, or kind of  
18 weak or bent over, I want to get him the walker and we  
19 will use the walker and I walk that way. If he walks  
20 pretty good some days, then I will just walk alongside him  
21 and hold his arm.

01:21:36

22 Q. Okay. And then when you get to the kitchen what  
23 happens next?

01:21:47

24 A. We start -- we sit him down, and then we have a  
25 newspaper there so he can kind of just keep up with that



FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 while we make his breakfast, which is a normal breakfast,  
2 toast and coffee.

3 And then I start getting his morning meds  
4 together and a MiraLAX and stuff that we mixed up so he  
01:22:02 5 can drink with the meds. And I now stand there and watch  
6 him take the medicine because I want to make sure he takes  
7 them all, he doesn't drop any or lose some.

8 Q. Is Mr. Brockman -- so, I take it somebody else  
9 prepares his breakfast?

01:22:12 10 A. Yes. We have a cleaning lady there. She's very  
11 sweet. When she can -- the majority of the time she can,  
12 she'll make his breakfast. If not, if she's like caught  
13 somewhere else, I'll run over there and I will just make  
14 it for him.

01:22:22 15 Q. Is Mr. Brockman capable of making his own  
16 breakfast --

17 A. No.

18 Q. -- in the morning?

19 A. No.

01:22:27 20 Q. And then, in terms of his medication, who is in  
21 charge of ensuring that proper doses are administered in  
22 the morning time and then throughout the day?

23 A. I make sure that he takes it.

24 Q. Could Mr. Brockman administer his own medications?

01:22:38 25 A. No.

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 Q. So, after breakfast, can you give us a little feel  
2 for what happens next in a typical day with Mr. Brockman?

3 A. After breakfast, if his wife comes out, he will sit  
4 there a little bit and wants to talk to his wife. But, if  
5 not, then we start the process of walking back and getting  
6 ready for his shower.

7 Q. Okay.

8 A. And, so, we will walk back to the shower room, and  
9 there I'll start to remove all his clothes. I have him  
10 holding on to the sink and stuff, and I remove his  
11 clothes. And then I walk him into the shower. And then  
12 we had -- I had them install some bars in there so he  
13 would be able to hold on, some really nice bars, so he can  
14 stay in that area. And then he starts showering, and I  
15 get all his clothes together, and then the towels to dry  
16 him off, and other medicines that I have to give him also  
17 and then -- when he comes out.

18 Q. Is Mr. Brockman capable of removing his clothes to  
19 get ready for the shower on his own?

20 A. No. No.

21 Q. Okay. So, after Mr. Brockman is taking his shower,  
22 do you help him get dressed?

23 A. Yes, I do. I'll open the door and I'll grab a hold  
24 of him so he can get in -- back into the restroom and walk  
25 him over to the sink, hold on there, and I'll start drying

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 him all off, from top to bottom, real good.

2 And then I put a patch, a patch that he  
3 has to have and --

4 **Q.** That's a medication patch?

01:23:57 5 **A.** Medication patch. Yes, he's got to have a patch.

6 And then I'll start putting -- I scratch  
7 his back because he has a lot of itching in his back,  
8 because some of the meds cause that. And, so, I got a  
9 little brush that I'll brush him for a little while just  
10 to help him, make him feel good.

01:24:11

11 Then I put this tube of Testim -- so, two  
12 tubes of that. It's a testosterone tube lotion. I rub it  
13 real good into his skin because it's got to absorb into  
14 the skin. You can't just put it on. You got to work it  
15 into the skin. Then I'll put some lotion. The  
16 dermatologist wants me to do that because there is  
17 certain -- those spots that she's kind of worried about,  
18 all over certain-- body and face and head. So, I do all  
19 that.

01:24:24

20 Then it put some Arthro gel, which is a  
21 cream for his back, lower back, and his hips. So, that  
22 gives me a good head start for the day. It helps him out.

01:24:35

23 **Q.** Okay.

24 **A.** Yeah. Yeah.

01:24:45

25 **Q.** And then do you help assist Mr. Brockman in actually

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 getting dressed for the day?

2 **A.** Yes. Yes. And that -- I have to coach him to step  
3 back. There is a seat behind us, a couple or maybe three  
4 steps. But I hold him and he casually -- kind of  
5 cautiously steps back, and I go, "Okay. Keep going for  
6 one more step." Then I will sit him down.

01:24:58

7 And then I'll -- what I'll do is I'll  
8 start combing his hair. And if he needs to shave, I'll  
9 shave him and I give him a good shave, real good shave. I  
10 used to let him -- when I first started, he did his own  
11 shaving, but it was all -- he didn't do it right. It was  
12 everywhere -- patches everywhere. So, I took charge of  
13 doing that also.

01:25:09

14 **Q.** Okay. So, at this point in time, Mr. Brockman is not  
15 capable of shaving --

01:25:19

16 **A.** No.

17 **Q.** -- himself?

18 **A.** No.

19 **Q.** Okay.

01:25:22

20 **A.** No.

21 **Q.** And then you also -- he's not capable of combing his  
22 hair --

23 **A.** No.

24 **Q.** -- and his personal grooming --

01:25:27

25 **A.** No.

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 Q. -- aspects?

2 Okay. After Mr. Brockman is dressed for  
3 the day, what sort of happens next?

01:25:37

4 A. Oh. In the bathroom, also, like I said, I pick his  
5 clothes every day. Every day. Since I came in I usually  
6 do that. I kind of find out what they like to dress, what  
7 their wardrobe was. So, I will get all his clothes and  
8 I'll dress him. And he has been very happy with that, the  
9 way I dress him and then -- shoes, everything.

01:25:50

10 So, then we do the -- brush teeth, and  
11 pretty much --

12 Q. You help him brush his teeth?

01:26:01

13 A. Yeah, I help him brush his teeth and everything. And  
14 I got a special brush also, because, before, we can't get  
15 a lot of strokes out of him on a manual one. So, I got a  
16 battery-operated where it vibrates.

17 So, there are certain things that I added  
18 more to -- for them to help the patient. I talked to the  
19 wife.

01:26:10

20 Q. Okay.

21 A. Yeah.

22 Q. And then -- so, after, you know, sort of getting all  
23 prepared for the day, is there typically any exercise?  
24 What happens next?

01:26:19

25 A. Yes. A lot of times we will take a walk outside in

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 the neighborhood. We'll maybe go several blocks down and  
2 then take little breaks. We take little breaks down there  
3 because he can't walk too much. He has to take a break.  
4 So, we'll find a little brick wall or something where he  
5 could sit down and then break a little bit for a while.  
6 We'll talk, and then get up, and then we will go again,  
7 finish off, and then brought ourselves back home.

8 **Q.** Okay.

9 **A.** Then I have a lot of times where I do therapy in the  
10 kitchen with a table, for his legs, you know, balance and  
11 all that. So, I do some of that. And then I alternate.  
12 In other days, I'll sit him on a chair and I'll do it for  
13 his legs to try to strengthen his legs so he can have some  
14 movements. So, yeah.

15 **Q.** Okay. And then what about lunch? Do y'all go out  
16 for lunch or stay in?

17 **A.** No, we don't -- she don't really allows us to go  
18 anywhere out. And I take it because -- I think that, you  
19 know, because of his dementia and all that, she is afraid  
20 that something -- he might get lost. So, we pretty much  
21 stay home. We don't go out. I'm okay. So, we eat lunch  
22 at home.

23 **Q.** Okay. And when you say "she," are you referring to  
24 Mrs. Brockman --

25 **A.** Mrs. Brockman, yes.

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 Q. -- would prefer you to stay home with --

2 A. Right. Right. Right.

3 Q. -- Mr. Brockman?

4 And, again, the same questions about food

01:27:28 5 at lunch. Does Mr. Brockman prepare his own lunch?

6 A. No. No.

7 Q. Is he capable of preparing his own lunch?

8 A. No. No.

9 Q. So, somebody else does that, maybe the --

01:27:38 10 A. Yes, a lady that's there and she makes the meals.

11 And then she fixes a lot of them, too, that she will  
12 freeze them in the freezer for us. So, then his wife will  
13 take some out for lunch, let them thaw out, and then we  
14 either cook it on the stove or heat it in the microwave.

01:27:55 15 Q. Okay. Anything else typically happen during the day  
16 before dinner or is it just kind of being at the  
17 Brockman -- Mr. Brockman's home?

18 A. It's just being at home. But, you know, I just try  
19 to keep up with him, try to stay with him, watch him, keep  
01:28:09 20 an eye, because, you know, he just a lot of times gets up  
21 and just starts going different directions and I don't  
22 know what he is doing. So -- and a lot of times he won't  
23 answer you, so I just kind of follow him and just see what  
24 he wants to do. But I try to stay as close as I can with  
01:28:23 25 him.

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 Q. Okay. We're going to talk about some specific  
2 examples you might want to share. But just to complete  
3 the day, is it then, you know, dinnertime and kind of the  
4 same routine as we have talked about with breakfast and  
5 lunch?

01:28:36

6 A. Yes. Yes. She will have something prepared, already  
7 heated up for him.

8 Q. Okay.

9 A. Yeah.

01:28:40

10 Q. And, again, he's not preparing his own meals?

11 A. No.

12 Q. Or dinner?

13 A. No. No.

14 Q. And is he able to -- is he able to feed himself and  
15 actually eat on his own?

01:28:49

16 A. Well, certain things. Say like a piece of chicken  
17 breast or something like that, we have to cut it up for  
18 him in bite sizes, you know.

19 Q. Okay.

01:28:59

20 A. And -- and I really don't -- I had talked to the wife  
21 before. I really don't want him having any kind of knives  
22 or stuff like that because I don't want him to hurt  
23 himself.

24 So I told her just butter knives is all I

01:29:10

25 would like for him to have and then if he needs cutting,



FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 I'll assist it. I'll cut everything up. Certain things,  
2 some burritos, some kind of tacos, and so I'll try to cut  
3 in pieces for him, so, yeah.

01:29:24

4 **Q.** Okay. And so after dinner, around what time does  
5 Mr. Brockman typically go to bed?

01:29:41

6 **A.** It could be anywhere from like 6:00, 6:30, maybe, you  
7 know, even close to 7:00. And so we start that process,  
8 you know, everybody is ready to go to bed. She is ready  
9 to go to bed. And so we will get up and we will go all  
10 the way back to the bedroom.

11 And when we get to the bathroom, I'll go  
12 ahead and right away give him his nighttime meds so he can  
13 take it with water there while he is standing there.

01:29:52

14 And then I'll ask him, I'll remove some of  
15 his clothes, but I ask him if he wants me to help him put  
16 some pajamas on. Sometimes he says, yeah. So I pick up  
17 some pajamas and put them on. And I have these special  
18 socks that I had ordered for him that have rubber on the  
19 bottom so he won't slip when he walks because, you know, a  
20 lot of times he tries to get up when you're not looking  
21 and so those socks are really very handy for him to have.

01:30:06

22 **Q.** Then do you assist Mr. Brockman in getting in -- into  
23 the bed?

24 **A.** I do, yes.

01:30:14

25 **Q.** Can he get into the bed by himself?

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 **A.** No. No. No. I have a procedure that I do. I get  
2 him all the way close to the bed where the pillow is at,  
3 and then I have him kind of get there and then I kind of  
4 help him sit down. Then I have him cross his legs, and  
01:30:30 5 I'll hold his shoulder and his leg, and I'll lift the  
6 legs, and I turn his shoulder this way so he can fall  
7 straight over his pillow.

8 **Q.** And he couldn't do that without you?

9 **A.** No. No. No.

01:30:39 10 **Q.** Okay. And so during the last seven months that you  
11 have been working with Mr. Brockman, have you observed a  
12 change in his physical health from the time that you began  
13 to today?

14 **A.** Yes.

01:30:51 15 **Q.** And is it better or is it worse?

16 **A.** It's worse.

17 **Q.** Okay. And the same question with his mental health,  
18 is that improved or -- or gone down?

19 **A.** It's gone down.

01:31:03 20 **Q.** Okay. We will talk about each of those, but in terms  
21 of his physical condition, what are some of the things you  
22 have noticed that are changes in Mr. Brockman over those  
23 seven months that you have worked with him, whether it's  
24 his weight or his ability to walk, whatever you have  
01:31:17 25 observed?

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

01:31:31

1 **A.** Well, that is one thing we noticed, is that he  
2 lost -- he lost weight. He used to weigh like 190, and  
3 then he has gone down to like 172, and so I brought that  
4 attention to his wife because Parkinson's patients do lose  
5 weight. And then when they lose weight, I found out that  
6 it's very difficult to gain that weight back on him.

01:31:44

7 And so I let her know, I said, I think we  
8 need to look into what he is eating. He is not eating as  
9 much as before, like he was before. And also the food  
10 that he is eating is not going to help him gain any  
11 weight.

12 **Q.** What do you mean by that?

01:31:55

13 **A.** Well, he is eating like -- they make like salad or a  
14 little soup, stuff like that, fruits. And so with that it  
15 is going to be -- it is healthy but is it not going to  
16 help him gain weight, and so we are going to lose more and  
17 more. And, like I say, it is very difficult to do that,  
18 very difficult.

01:32:06

19 And so she is kind of listening and she  
20 tried to change some things, you know, but I feel like not  
21 enough, but that -- yeah, that is what we do.

22 **Q.** How about his ability to walk? How is that compared  
23 to when you first started?

01:32:17

24 **A.** His walk is different. There is times that you have  
25 to -- like I said, you have to look at him and his steps

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 that are okay. Okay. So I can walk with him. And then  
2 there are times when he is stomping a little bit. He is  
3 not really walking. It's more of a caution walk and  
4 stuff, slide. So I had to keep an eye on that and, like I  
5 said, we use the walker for that, so I make sure that he  
6 doesn't fall down. Yeah.

7 **Q.** So he uses a walker at home from time to time?

8 **A.** Uh-huh. Yes.

9 **Q.** Okay. What about just his strength, whether -- in  
10 his arms and his ability to hold things, have you noticed  
11 any change there?

12 **A.** Yes. We -- one of the exercises I do in the patio  
13 because I like to get him out a little bit on his patio  
14 there is do some exercises there and we have some weights  
15 and stuff.

16 And when I first started it was like five  
17 pound weights he was able to lift and stuff. Now, since  
18 he came back from the hospital and all that, it is not --  
19 we have to decrease on the weights. We were down to two  
20 pounds and he couldn't really do it. It was too much. He  
21 didn't want to do it.

22 So I said okay, so I gave him one pound in  
23 each hand. I said, We will just do one and then we will  
24 work our way back up to that, so that's normally what  
25 we're at, is at the one pound weights on there.

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 Q. Do you try to encourage Mr. Brockman to exercise?

2 A. I do. I tell him, I said, Mr. Brockman from my  
3 experience working with Parkinson's, you have to exercise.  
4 You have to at least do twice a day, and then do normal  
5 stuff, move around.

01:33:25

6 You got to move because if not it is going  
7 to decrease, and it is going to be backwards we are going  
8 to go, and so we are going to be more dependent of the  
9 walker, or more of the -- later on that you are going to  
10 have to use a wheelchair. And those are going to be very  
11 difficult.

01:33:37

12 My job is to try to not -- to help you so  
13 you don't depend much on these things, and if you listen  
14 to me, I can help you, you know.

01:33:47

15 Q. And so how has that over time been in terms of  
16 Mr. Brockman listening to you, and being, you know,  
17 receptive to what it is you are trying to get him to do  
18 physically?

19 A. It's been very difficult. You know, I try to work  
20 out, that I tell him, said we need to do exercises. And  
21 he just looks at me. He goes, I got stuff to do. I have  
22 to get my paperwork. I have to get my suit case.

01:34:01

23 And I say, Well, you know, we need to do  
24 this, you know. I will do it later on. So he has been  
25 very difficult to coach him into doing a lot of -- like he

01:34:16

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 did before in the beginning, yeah.

2 Q. I want to talk about some of those sort of confusion  
3 episodes in a minute. But let's talk about just, we  
4 covered the physical aspects with Mr. Brockman. You said  
01:34:28 5 you had also noticed a decrease in Mr. Brockman's mental  
6 capabilities --

7 A. Yes.

8 Q. -- as well?

9 A. Yes.

01:34:34 10 Q. And you were already working for the Brockmans, I  
11 take it, when -- when Bob was hospitalized in late May and  
12 early June?

13 A. Yes.

14 Q. Okay.

01:34:45 15 A. Yes.

16 Q. And let's talk about that. Were you with  
17 Mr. Brockman that day when he was taken to the hospital?

18 A. Yes.

19 Q. Tell us what happened -- what you observed that day  
01:34:53 20 that led to Bob being hospitalized.

21 A. Are you talking about the one in May?

22 Q. Yes.

23 A. May. Okay. Yes. That particular day I came in, and  
24 my night caregiver didn't say anything, just normal. I

01:35:05 25 said, Okay. So I did my normal stuff with him and stuff

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 like that, stretch him and everything, got him dressed.  
2 Went to the breakfast table, had breakfast. And then he  
3 kind of looked different there, but he ate his breakfast,  
4 but he was kind of different and then he got up. And  
01:35:20 5 normally, like I said, he either talks to his wife or he  
6 goes to shower. Well, the wife wasn't there.

7 He went to the long sofa, sat there, and I  
8 said, What are you doing, Mr. Brockman? He said, I'm just  
9 going to rest here for a little bit. I said, Okay.

01:35:32 10 Because I thought he was tired. I said, Okay, rest there  
11 a little bit. He didn't sleep good.

12 But he was -- started like falling asleep  
13 in a deep sleep and everything. And he didn't -- I said  
14 -- later on he didn't even want to take the shower. I  
01:35:43 15 said, okay, just let him rest. Maybe he's exhausted.

16 So lunchtime came. He never got out of  
17 the sofa, but lunchtime came. She fixed something, and  
18 then we went and walked over there to the table. I helped  
19 him sit there. And normally, like I said, he eats really  
01:35:57 20 good his meals and so this time he just took like a  
21 spoonful like this and then he set -- then all of a sudden  
22 he just stayed there like that, had a glazed look, just  
23 like he wasn't even there.

24 I said to myself, something is up here.

01:36:08 25 He's got something going on. So I started doing his

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01:36:21

1   vitals and everything. The vitals were okay, except for  
2   the temperature was a little bit up. And so I couldn't  
3   figure it. I said there is something going on. I said,  
4   but we need to take him -- I am going to take him to a  
5   doctor.

01:36:29

6                   So this is -- she is brand new, Ms.  
7   Brockman is brand-new to me, so she don't know if she  
8   would -- I don't know if she would understand or would  
9   trust me in saying what I want to do.

01:36:42

10                   So, I called my supervisor. I said, Look,  
11   he doesn't look right. He's got a glazed look. He's like  
12   -- he is out of it and something is wrong with him. I  
13   want to take him to urgent care which I love to go, part  
14   of Methodist. I said, I want to take him there and check  
15   him out, and if there is anything wrong, they will find  
16   it; if not, we come home with a good bill of health.

01:36:53

17                   So I said, but I need you to explain to  
18   the wife because she might -- because you're the company  
19   owner and everything that -- so he did. He talked to her,  
20   and he told her that my guy Frank feels that Mr. Brockman  
21   is not well, that he needs -- he wants to take him to the  
22   clinic right now so they can at least check him, let's go  
23   ahead and do that. So I did, I take him there.

01:37:07

24   Q.   And you said urgent care, was this an urgent care  
25   associated with Houston Methodist?



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1 **A.** Yes.

2 **Q.** And then ultimately was Mr. Brockman admitted to the  
3 hospital at Houston Methodist after that?

01:37:17

4 **A.** Yes. Yes. As a matter of fact, they said -- they  
5 started right away when I took him to Methodist, taking --  
6 finding out, they put some I.V. in him and they took some  
7 urine sample. They took blood out of him because they  
8 wanted to see what was going on.

01:37:30

9 And then later on they determined that he  
10 had some type of infection, but that we need to take him  
11 to Methodist, and I am going to have an ambulance come  
12 here and take him. And so I said, Great, I told them I  
13 agree with that. Let's do that, you know.

14 **Q.** So Mr. Brockman was transported to the hospital?

01:37:42

15 **A.** Yes. Yes.

16 **Q.** And how long was he in the hospital?

17 **A.** You know, he was there for a long, long time.  
18 Normally, some of the UTIs I had before, you know, three  
19 days, maybe five days, but he was in there, I think,  
20 around 10, 12 days.

01:37:55

21 And I even was talking to his doctors like  
22 five days before, four days before, I said I would like to  
23 make sure that he is -- because he is not well. He is  
24 still not well, you know. I know y'all are working on  
25 this infection and you're giving him the antibiotics, but

01:38:09

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1 I can tell by looking he is very confused.

2 He doesn't know what is going on and it is  
3 going to be very difficult for us to bring him home like  
4 that. I said, because, when I leave, the guys at night  
01:38:22 5 don't know how to handle this, and she is only there and  
6 she cannot take care of him. If he falls down or starts  
7 to, there is nothing she could do.

8 So I need more time if you allow it, and  
9 he did, the doctor did, said, Okay, we will extend it.

01:38:34 10 That's why we got it to 12 days.

11 Q. So, ultimately, he was in the hospital for about two  
12 weeks --

13 A. Yes.

14 Q. -- to get to a place --

01:38:39 15 A. Yes.

16 Q. -- where he could come home?

17 A. Yes.

18 Q. And did you -- you know, after that hospitalization,  
19 have you observed changes in Mr. Brockman in terms of his  
01:38:48 20 mental capabilities, any -- any differences that you  
21 noticed, any, you know, experiences that you have had with  
22 how Mr. Brockman has behaved?

23 A. Yes. I noticed that when we came back, there was a  
24 lot of -- he was very confused. He didn't know what was  
01:39:04 25 going on. He didn't know where we were at. His walking

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01:39:22

1 was not proper. It was very weak. He was leaning so much  
2 forward, he was walking real -- kind of like -- so I took  
3 away the exercises that we did outside because I didn't  
4 feel like it would be safe for him or us to take him out  
5 there.

01:39:32

6 So I said if we are going to do anything,  
7 we will try to keep it a minimum in here. But he was -- a  
8 lot of stuff going on with him now. You could tell his  
9 mind-wise -- he started talking about things that didn't  
10 make no sense.

01:39:42

11 **Q.** Well, let me ask you some examples of some of that.  
12 Did you notice anything about Mr. Brockman, you know,  
13 packing up a briefcase or anything like that, and tell the  
14 Court what you observed?

01:39:57

15 **A.** Yes. He has been standing up and all of a sudden  
16 looking around, and I would ask him Mr. Brockman, What are  
17 you doing? He said, I need to get my briefcases together  
18 and some of my paperwork. I said, What for, sir? He  
19 said, Well, I am going to the office. I said, Okay.

20 I said, Sir, we're at home. He said, I  
21 know, but I'm going to leave here. I have to leave here.  
22 And then he had this look, when he came from the hospital,  
23 he has like he is really mad or something. You can tell  
24 in the expression.

01:40:09

25 And so I said, Okay. I'm just going to

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1 follow with him and let him do what he needs to do because  
2 I don't want him to really get upset. So he will walk  
3 around and he is opening doors. He doesn't like -- know  
4 where he is going, you know, with his briefcase.

01:40:20

5 Finally we go to the office and he is just  
6 standing there, and then he finds some cases under the  
7 desk, pulls them out, looks at them. He opens them up,  
8 and then he's not putting anything in there. I just watch  
9 him, you know, he will grab like a pen or a paper, and

01:40:34

10 then he lifts them up and he puts them right in front of  
11 the entrance to the door of the office right there. And  
12 so he got two suitcases and he opens a big suitcase, you  
13 know the key for this? I said, No, sir, Mr. Brockman, I  
14 don't know where the key is for that.

01:40:46

15 But he has it open, so I don't know  
16 anything. So he is looking. So he has got -- this has to  
17 go with me. And so then he grabs it, so he has his  
18 suitcase. Then he has a white container under his desk  
19 that has paper stuff in it. He is trying get it out.

01:41:01

20 What are you doing, Mr. Brockman? Says,  
21 This has to go. I said, Okay. So I leave it there. And  
22 then I let him -- after a while then he just kind of sits  
23 there and then glazed thinking and stuff. Okay.

01:41:15

24 Q. Is that -- so how have you dealt with that,  
25 Mr. Gutierrez? I mean, do you just sort of let Mr.

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 Brockman pack up his bags, and then --

2 **A.** Yes.

3 **Q.** -- hope he forgets, or what happens?

4 **A.** Yes. Well, after that, I try to say something to

01:41:24

5 him, so I am going to wait for a time that maybe he rests  
6 or do something else. And we can kind of, 'Want to go to  
7 the front room, your wife is there?' And he goes, 'Yes.'  
8 I say, 'Okay.'

9 So I will sit him there, and she is

01:41:35

10 talking to him. That is when I go back there and I'll  
11 grab the suitcase, and instead of putting them in the same  
12 place, I hide them because I don't want him to see it  
13 because if he's sees it, it just restarts what we have  
14 been doing -- what he been doing.

01:41:45

15 So I put all those things and I hide them  
16 in different places, and I let the wife know sometimes,  
17 'Hey, look, I hid his stuff because, if not, he is going  
18 to go back again.'

19 And I'm afraid he might even go to the

01:41:56

20 point that he wants to start walking outside and we are  
21 going to have a problem.

22 **Q.** Have you had any situation where Mr. Brockman, you  
23 know, during a meal, believed he was somewhere other than  
24 his own home?

01:42:04

25 **A.** Oh, yes. We had quite a bit where he's -- he thinks

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01:42:20

1 he's at a restaurant. He will say, 'This food is really  
2 good here at this restaurant.' And I say, you know, 'Oh,  
3 okay.' Then he says, 'Who is going to pick us up?' I  
4 said, 'What?' He says, 'Yeah, who is going to pick us up  
5 and take us home?'

01:42:30

6 And then, like I said, sometimes, I look  
7 at him and his face and I see if I can get away with it or  
8 something, I will say, 'Well, Mr. Brockman, we are at  
9 home. You are at dinner here at home. There is nobody  
10 going to pick us up, you know.'

01:42:43

11 Other times he's -- like if he is really  
12 kind of agitated or something, I just leave him alone and  
13 say, 'Okay. I will find out. What I found out, a lot of  
14 things when he gets mad about certain things -- he gets  
15 mad at me because he thinks I am not well prepared when  
16 he's doing things to go to the office.'

01:42:55

17 He will look at me and say, 'What is your  
18 role at the office?' Like, what are you supposed to do at  
19 a meeting or something, I say, 'Mr. Brockman, I don't work  
20 at your office. I work for you. I am here to take care  
21 of you.'

22 Q. So, he is confusing, or I guess, is it your understanding --  
23 is it your impression he was thinking you were working for him  
24 at the business --

01:43:06

25 A. Yes.

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1 Q. -- and not as a caretaker?

2 A. Yes. And so, yeah, so when he does that I kind of  
3 just -- what I used -- what helped me a lot is because he  
4 is really good friends with Tommy. He loves him. So I  
01:43:17 5 will say 'Look, Tommy is going to come later on this  
6 afternoon or tomorrow. We will find out. We can ask  
7 him.' And sometimes it's like, 'That's a good idea.  
8 Okay.' And --

9 Q. He will just kind of move off?

01:43:28 10 A. Move off and then we just hopefully maybe have him  
11 concentrate on something else.

12 Q. Have you ever had any circumstances where  
13 Mr. Brockman was confused about where he was in his own  
14 home?

01:43:37 15 A. Yes. A lot of times he thinks that this is a nice  
16 hotel. You know, 'When is the airplane going to pick us  
17 up?' And, 'Who is going to pilot the plane?' I says, 'I  
18 don't know that, sir.'

19 'Where is my keys to my car?' I said,

01:43:55 20 'What for sir?' He said, 'I am going to drive us home.'  
21 You know, and so, I don't know, so we got trouble here. I  
22 don't want him to get in a car and start it and, you know,  
23 these cars, you just touch them.

24 And so then I say, 'Well, then, I'll try  
01:44:06 25 to find out. Maybe the ladies know where the keys are. I

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1 don't know.' And then I will try to run somewhere when I  
2 get a chance real quick, let the wife know he is trying to  
3 get the keys to the car, so we need to talk to him so we  
4 can get him off of that.

01:44:20

5 **Q.** So, this type of episodes, I mean, are these things  
6 that you have seen in other patients that you have  
7 previously worked with, with Parkinson's dementia?

8 **A.** Yes. Yes.

01:44:33

9 **Q.** And do these episodes seem to be happening with more  
10 frequency as time goes on, or less?

11 **A.** No. More.

01:44:48

12 **Q.** Now, at some point during the time period that you  
13 cared for Mr. Brockman, did you learn that the government  
14 has taken the position that Mr. Brockman is faking or  
15 exaggerating his symptoms?

16 **A.** Yeah. I heard just talk. They really don't let me  
17 know a lot of stuff. When they come, they send me  
18 sometimes to go to another room or something because they  
19 didn't want me to -- they cared for me not to get

01:45:02

20 involved. And I said, 'No, sure. No problem. I don't  
21 have a problem. I'll walk over there.'

22 But there is -- I heard one time before  
23 where they were mentioning about that. She was talking to  
24 him. And I can't believe they're doing that, you know,  
25 that they don't believe that and stuff and, so, I -- yeah,

01:45:12



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1 I heard before.

2 **Q.** Okay. So when you heard that, did you -- did you  
3 think it was possible that Mr. Brockman was faking or  
4 exaggerating his symptoms?

01:45:24

5 **A.** No. No. And what I -- when I heard that, too, I was  
6 kind of -- I was a little bit -- I was a little bit  
7 worried because I am here to take care of a patient, and  
8 if I have somebody that's acting, or some way just to do  
9 something for whatever it is they are doing, then, to me  
10 that's -- I don't need to be here in this place. I need  
11 to really go where somebody needs my help.

01:45:38

12 So, when I heard that, I started, like,  
13 Oh, my God, is he acting? Is it? So I started kind of  
14 keeping more close of him, looking at his -- what he does,  
15 what he's -- see if he's like -- because I feel like if  
16 somebody is lying, they can't lie too long. They are  
17 going to have to be able -- something comes out that is  
18 normal, that's where he is sharp and all that. And so  
19 that's what I was looking for, but I never was able to see  
20 anything like that at all.

01:46:03

21 **Q.** So, is there any doubt in your mind, Mr. Gutierrez,  
22 as you sit here today, that Mr. Brockman's physical  
23 symptoms are real?

24 **A.** They are. They are real.

01:46:15

25 **Q.** Same question with respect to his mental

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 difficulties. Any doubt in your mind that those are real?

2 **A.** Yes, sir. They're real. They are so real. I will  
3 say something real quick, that they're so real that I get  
4 nervous. I am kind of a little bit scared. Because when  
01:46:32 5 they are like that, you don't know what they are going to  
6 do. So I just -- I am so afraid that they are going to  
7 get hurt or hurt somebody else, especially his wife who is  
8 very -- not in really good health right now herself. She  
9 is in really bad pain because of back and lower back and  
01:46:45 10 hip, and so I am really real caution about that and so  
11 that's why.

12 **Q.** All right. I am showing -- going to put on the  
13 screen here, Mr. Gutierrez, what is in evidence as Defense  
14 Exhibit 72, and I just want to -- I highlighted a few  
01:46:59 15 things here. You have been working with the Brockmans and  
16 -- Mr. Brockman since April of this year?

17 **A.** Right.

18 **Q.** Okay. And so since you -- you began assisting Bob,  
19 fair to say there has been a large number of interviews  
01:47:17 20 and tests that have been undertaken by Mr. Brockman in  
21 connection with why we're here today?

22 **A.** Yes. Yes.

23 **Q.** Okay. I have got a few of these highlighted. And I  
24 just want to note here on -- on May 5th, first highlighted  
01:47:30 25 mark, did you -- did you assist Mr. Brockman in getting to

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 the interview with Dr. Darby?

2 **A.** Dr. Darby?

3 **Q.** On May 5th, the very first one.

4 **A.** Oh, yes. Yes. Yes.

01:47:42

5 **Q.** And that one lasted, I think we have up here, about  
6 three hours. When Mr. Brockman would be there for these  
7 interviews, would you be present inside the interview  
8 room, or be outside available for whenever you were called  
9 in to assist Mr. Brockman?

01:47:57

10 **A.** I would be outside.

11 **Q.** Okay. But for this first one on May 5th, you were  
12 present and helped Mr. Brockman get there?

13 **A.** Right.

01:48:08

14 **Q.** And also helped him go to the restroom during the --  
15 you know, in the middle of the interview, is that fair?

16 **A.** That's correct.

17 **Q.** And then also help him depart the meeting?

18 **A.** That's correct. Yes.

01:48:18

19 **Q.** At any point on May 5th, did Dr. Darby try to  
20 interview you?

21 **A.** Darby? No. No.

22 **Q.** No? Okay. I am going to ask a series of these same  
23 questions. Okay. And I'll do it a little bit faster.

24 Do you recall May 18th, Dr. Denney and

01:48:32

25 Dr. Dietz interviewed Bob for eight hours at a hotel in

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 downtown Houston?

2 **A.** Yes.

3 **Q.** Did you help Mr. Brockman get to that interview, help  
4 him during restroom breaks, and then help him depart the  
5 meeting?

01:48:46

6 **A.** Yes.

7 **Q.** Did Dr. Dietz or Dr. Denney ask to interview you at  
8 any point during that time?

9 **A.** No.

01:48:52

10 **Q.** And then on March -- I'm sorry -- May 19th, do you  
11 recall that Mr. Brockman again reported for an interview  
12 with Dr. Denney that also was around eight hours that  
13 following day?

14 **A.** Yes.

01:49:05

15 **Q.** Did Dr. Denney seek to interview you that day?

16 **A.** No.

17 **Q.** The following day, on May 20th, Dr. Dietz and  
18 Dr. Denney were again both interviewing Mr. Brockman, if  
19 you will recall?

01:49:17

20 **A.** Yes.

21 **Q.** The same questions. Did you help Mr. Brockman get  
22 there, help during breaks and help him depart?

23 **A.** Yes.

24 **Q.** At any point in those times -- in that time, did

01:49:24

25 Dr. Dietz or Dr. Denney seek to interview you?

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 **A.** No.

2 **Q.** And then just moving down to October, the same  
3 questions. Do you recall helping Mr. Brockman get to  
4 Dr. Dietz and Dr. Denney's interview of him at the Jones  
5 Day offices on October 20th?

01:49:38

6 **A.** Yes, I did help him.

7 **Q.** The same questions. You helped him arrive, helped  
8 him during breaks, and helped him depart?

9 **A.** Yes.

01:49:47

10 **Q.** The same question for October 26, when Dr. Denney  
11 came for a follow-up meeting for just about an hour.

12 **A.** Yeah, I remember that. Yes.

13 **Q.** Okay. The same questions. On the 20th or the 26th,  
14 did Dr. Dietz or Dr. Denney ever seek to ask you any  
15 questions?

01:50:00

16 **A.** No.

17 **Q.** Now, in all those instances and interactions, did  
18 either of those doctors or any three of the doctors -- set  
19 aside interview you -- just ask you questions about how  
20 Bob was, what it was like to be with him on a daily basis?

01:50:12

21 **A.** No.

22 **Q.** Did they ask you any of those questions?

23 **A.** No.

24 **Q.** Would you have talked to them if they had asked you?

01:50:19

25 **A.** Yes.

FRANK GUTIERREZ - DIRECT BY MR. VARNADO

1 Q. I just want to ask some final questions here.

2 I am showing you some testimony from  
3 Dr. Darby, who was the first person that, if you'll  
4 remember, interviewed Bob.

01:50:37

5 A. Uh-huh.

6 Q. And I want to just be very clear. As we sit here  
7 today and during the time period you have taken care of  
8 Mr. Brockman, does he need help with his grooming?

9 A. Okay. I'm sorry. What was that?

01:50:51

10 Q. During the time -- As you're taking care of  
11 Mr. Brockman today --

12 A. Right.

13 Q. -- and every day --

14 A. Right.

01:50:57

15 Q. We have kind of walked through a day. I just want to  
16 ask you some specific questions.

17 -- do you have to assist Mr. Brockman with  
18 his grooming?

19 A. Yes.

01:51:04

20 Q. With grooming his hair --

21 A. Yes.

22 Q. -- and shaving?

23 A. Yes.

24 Q. And the same thing with his self-care, whether it's,  
25 again, shaving or combing his hair --

01:51:09

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

FRANK GUTIERREZ - CROSS BY MR. LANGSTON

1 A. Yes.

2 Q. -- or getting ready?

3 A. Yes.

4 Q. And what about using the restroom?

01:51:17 5 A. Yes.

6 Q. And then does Mr. Brockman have difficulty  
7 remembering where he is?

8 A. Yes.

9 Q. And does he also have difficulty recognizing his own  
01:51:25 10 home?

11 A. Yes.

12 MR. VARNADO: I am going to pass the witness.

13 THE COURT: Cross-examination, whenever you are  
14 ready.

01:51:34 15 MR. LANGSTON: Thank you.

16 **CROSS-EXAMINATION**

17 BY MR. LANGSTON:

18 Q. Good afternoon, Mr. Gutierrez. My name is Lee  
19 Langston.

01:51:51 20 A. Yes, sir.

21 Q. I think you testified you have only known  
22 Mr. Brockman since April 15th, 2021?

23 A. Yes, sir.

24 Q. And you can't speak to how he was like before that  
01:52:05 25 date; is that fair?

KATHY MILLER, RMR, CRR - kathy@millers-reporting.com

FRANK GUTIERREZ - CROSS BY MR. LANGSTON

1 **A.** That's fair.

2 **Q.** Okay. And, so, you don't know what his mental state  
3 was on March 1st, 2019?

4 **A.** No, sir.

01:52:13

5 **Q.** You can't talk about it for April 20th -- April of  
6 2020?

7 **A.** What --

8 **Q.** Of 2020.

9 **A.** Oh, sorry. Yeah. No. No, sir.

01:52:23

10 **Q.** For November of 2020?

11 **A.** Right. No.

12 **Q.** And I think Mr. Varnado asked you a series of  
13 questions about things Mr. Brockman can and can't do; is  
14 that fair?

01:52:34

15 **A.** Yes. That's -- yes.

16 **Q.** And some of those were based on physical limitations;  
17 is that correct?

18 **A.** That's correct.

19 **Q.** And some of them are based on mental limitations?

01:52:42

20 **A.** Yes.

21 **Q.** And it's fair to say that those can be different; is  
22 that fair?

23 **A.** Yes.

01:52:49

24 **Q.** That sometimes a patient -- there are certain things  
25 they can't do because physically they can't do it?



FRANK GUTIERREZ - CROSS BY MR. LANGSTON

1 **A.** Right.

2 **Q.** And sometimes there are things they can't do because  
3 mentally they can't do it?

4 **A.** Right.

01:52:55

5 **Q.** So, simply because someone physically can't do  
6 something, that doesn't necessarily mean they can't do it  
7 mentally.

8 **A.** Right.

9 **Q.** Is that fair?

01:53:02

10 **A.** Right.

11 **Q.** And I think you -- you talked a little bit that  
12 sometimes -- I think you used the word "they" are talking  
13 about his criminal case?

14 **A.** I'm sorry? I'm sorry? What?

01:53:15

15 **Q.** I think I heard on your direct examination that  
16 sometimes they would be talking about his criminal case.

17 **A.** No.

18 **Q.** Okay. Let me ask it this way. Are there sometimes  
19 meetings that Mr. Brockman has with his attorneys?

01:53:29

20 **A.** Yes.

21 **Q.** Okay. And do you go into the room with them?

22 **A.** No.

23 **Q.** Okay. So, you don't know what's discussed inside  
24 those meetings.

01:53:35

25 **A.** No.

FRANK GUTIERREZ - CROSS BY MR. LANGSTON

1 Q. Is that fair?

2 A. That's fair.

3 Q. And I think you talked, when you said you learned  
4 that the government may be accusing him of faking -- Do  
01:53:44 5 you remember discussing that?

6 A. Yeah. Only through -- the wife was talking to him,  
7 because -- that -- just to him, real low, and I just  
8 happen to heard a little bit of that, yeah.

9 Q. Okay. And, so, sometimes Mrs. Brockman and  
01:53:55 10 Mr. Brockman will have discussions, and you don't want to  
11 invade their privacy; is that fair?

12 A. That's -- yes.

13 Q. So, you may pick up little bits and pieces here and  
14 there, but, by and large, you try to let them have those  
01:54:07 15 conversations privately; is that fair?

16 A. Most of the time they do have it privately. Even the  
17 phone calls, because she will tell me, you know, to --  
18 'Frank, do you want to go ahead and' -- or they will go to  
19 the office a lot. That's where they have their calls  
01:54:18 20 there or talk to people, yeah.

21 Q. So, sometimes there will be phone calls and they will  
22 say, you know, 'We'll handle this one without you.'

23 A. Yes.

24 Q. Is that fair?

01:54:24 25 A. Yes. Actually, what I do is I help him -- like I

FRANK GUTIERREZ - CROSS BY MR. LANGSTON

01:54:38

1 said, because they want to have it somewhere where he is  
2 safe, so -- Most of the time it's in the office. So, I  
3 will walk him into the office to have those phone calls or  
4 the Zooms and all that. So, I will set him there with a  
5 bottle of water and then close the door, and then I go all  
6 the way to the kitchen while they're way back there, over  
7 there.

01:54:48

8 **Q.** Okay. And, so, other than what you may learn later,  
9 you don't know what happens on those phone calls or  
10 meetings or anything?

11 **A.** No, sir.

12 **Q.** And I think you said sometimes Mr. Barras will come  
13 visit?

14 **A.** Yes.

01:54:53

15 **Q.** And do you give him privacy during those meetings?

16 **A.** Yes.

17 **Q.** Okay.

18 **A.** Yes.

01:55:03

19 **Q.** In -- as part of this case, I think, you were asked a  
20 series of questions about how you didn't speak to the  
21 government experts; is that fair?

22 **A.** Right.

23 **Q.** I think you said it was because they didn't ask.

24 **A.** Right.

01:55:10

25 **Q.** You did speak to one of the defense experts in this

FRANK GUTIERREZ - CROSS BY MR. LANGSTON

1 case. Right?

2 **A.** I don't remember that.

3 **Q.** Did you speak to a Dr. Agronin? Do you remember  
4 doing that? He is sitting there in the second row. Does  
5 that jog your memory?

01:55:21

6 **A.** Oh, yes. Yes. Yes. Yes.

7 **Q.** And Dr. Agronin was interviewing about Mr. Brockman's  
8 mental competency; is that fair?

9 **A.** Yes.

01:55:36

10 **Q.** And he wasn't one of Mr. Brockman's treating doctors?

11 **A.** No. No. No.

12 **Q.** And, so, you understood that he was talking to you to  
13 try and make an evaluation of Mr. Brockman for this case;  
14 is that fair?

01:55:49

15 **A.** It was more just -- it was more like because I walked  
16 in, he was getting ready to leave and he just kind of  
17 asked me some simple questions right there, just, you  
18 know -- nothing like -- you know, he was just talking,  
19 asking me questions. That was it. Yeah.

01:56:03

20 **Q.** So, it wasn't a formal thing?

21 **A.** No, sir.

22 **Q.** And I think you gave him his medications, maybe; is  
23 that right?

24 **A.** To be honest, I can't remember. I know that he was  
25 just asking me some simple questions but nothing really

01:56:14

FRANK GUTIERREZ - CROSS BY MR. LANGSTON

1 big or anything.

2 **Q.** Okay. But he was trying to get a sense for your  
3 treatment of Mr. Brockman; is that fair?

4 **A.** Yeah.

01:56:25

5 MR. LANGSTON: Just one minute, Your Honor.

6 THE COURT: Sure.

7 BY MR. LANGSTON:

8 **Q.** And you told him? You spoke to him about it?

01:56:40

9 **A.** Yeah. Yeah, because it was more like -- the way  
10 he -- he talked to me, it was like just a passing. We  
11 just -- because they were like he was done. And, so,  
12 really, I didn't take really full thought of what it --  
13 you know.

01:56:53

14 **Q.** Sure. Now, I am going to show you what I am going to  
15 mark for identification as 160 --

16 **A.** Uh-huh.

17 **Q.** -- Government's Exhibit 160.

18 MR. LANGSTON: Now, I'll hand a copy to the  
19 witness.

01:57:04

20 **A.** Thank you.

21 BY MR. LANGSTON:

22 **Q.** And these are notes that Mr. Agronin took about his  
23 interview.

24 **A.** Uh-huh.

01:57:17

25 **Q.** Did he ever show this to you?

FRANK GUTIERREZ - CROSS BY MR. LANGSTON

1 **A.** No.

2 **Q.** Okay. And have you ever seen this before?

3 **A.** No.

01:57:26

4 **Q.** All right. But the list of medications there, is  
5 that the list of the medications as of October of 2021?

6 **A.** Yes.

7 **Q.** Okay. And I want to look at the first two sentences.

8 **A.** Uh-huh.

01:57:55

9 **Q.** "Frank Gutierrez, a personal aide to Robert Brockman.  
10 He has worked with Mr. Brockman for the past year-plus and  
11 has seen him slowly but steadily decline physically and  
12 mentally."

13 This was -- you talked to him in October  
14 of 2021?

01:58:09

15 **A.** Yes. Somewhere around there, yeah.

16 **Q.** And I think you -- as you have said, you only worked  
17 with Mr. Brockman since April?

18 **A.** Right.

19 **Q.** So, about five months at that point? Six months?

01:58:19

20 **A.** Yes. Yes.

21 **Q.** Okay. So, it's fair to say you hadn't worked with  
22 him for a year --

23 **A.** No.

24 **Q.** -- plus?

01:58:24

25 **A.** No.

FRANK GUTIERREZ - CROSS BY MR. LANGSTON

1 Q. And, so, Dr. Agronin probably just got that wrong?

2 A. Yes. Yes.

3 Q. Okay.

4 MR. LANGSTON: I'll offer 160, Your Honor.

01:58:31

5 MR. VARNADO: No objection.

6 THE COURT: Without objection, 160 is admitted.

7 MR. LANGSTON: And no further questions.

8 MR. VARNADO: No further questions, Your Honor.

9 THE COURT: May this witness be excused?

01:58:38

10 MR. VARNADO: Yes, he can.

11 THE COURT: Thank you, Mr. Gutierrez.

12 THE WITNESS: Thank you, sir.

13 MR. LOONAM: Next witness?

14 THE COURT: You may call your next witness.

01:58:53

15 MR. LOONAM: Your Honor, we call Dr. Thomas

16 Guilmette.

17 THE COURT: Good afternoon, sir. If you could  
18 raise your right hand -- well, juggle there -- raise your  
19 right hand.

01:59:06

20 (Witness sworn.)

21 THE WITNESS: I do.

22 THE COURT: Please take the stand, sir.

23 THE WITNESS: Thank you.

24 THE COURT: And you may take your mask off if

01:59:27

25 you wish.

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 THE WITNESS: Okay. Thank you.

2 THE COURT: It's not a problem.

3 **THOMAS GUILMETTE, Ph.D.,**

4 duly sworn, testified as follows:

01:59:32

5 **DIRECT EXAMINATION**

6 BY MR. LOONAM:

7 **Q.** Good afternoon, Dr. Guilmette.

8 **A.** Good afternoon.

9 **Q.** Please state and spell your last name for the court

02:00:14

10 reporter.

11 **A.** Thomas Guilmette. G-U-I-L-M-E-T-T-E.

12 **Q.** And what do you do for a living?

13 **A.** I am a psychologist.

14 **Q.** And where do you work?

02:00:24

15 **A.** I am a professor of psychology at Providence College,  
16 in Providence, Rhode Island, and also an adjunct associate  
17 professor of psychiatry and human behavior at Brown  
18 University Medical School. And I also work in a private  
19 practice where I see patients, and I also do some forensic  
02:00:43 20 consultation.

21 **Q.** All right. Can you walk us through your educational  
22 background.

23 **A.** I graduated with a bachelor's degree in psychology  
24 from Providence College. I received my Ph.D. in

02:00:55

25 counseling psychology from the University of Missouri in



THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 Columbia, Missouri. I completed a clinical psychology  
2 internship at Walter Reed Army Medical Center in  
3 Washington, D.C. And I completed a two-year postdoctoral  
4 fellowship in clinical neuropsychology at Rhode Island  
5 Hospital and Brown University School of Medicine.

02:01:13

6 **Q.** All right. And can you walk us through the history  
7 of your clinical work?

8 **A.** You mean the jobs that I have had clinically?

9 **Q.** Yes.

02:01:22

10 **A.** Okay. My first job after my internship, I was an  
11 Army psychologist, and I worked at the Army hospital at  
12 the United States Military Academy at West Point, New  
13 York. I then did my two-year postdoctoral fellowship.  
14 After that I became clinical director of neuropsychology  
15 at the Vanderbilt Rehabilitation Center in Newport  
16 Hospital. I then worked from -- that was from '86 to '90.

02:01:41

17 From '90 to '97 I was director of  
18 neuropsychology at Rhode Island Hospital. I also  
19 consulted at some local rehabilitation centers, hospitals  
20 as well.

02:02:00

21 I was in private practice for a year from  
22 '97 to '98. In 1998 I joined the faculty at Providence  
23 College and also continued to do consulting at local  
24 hospitals.

02:02:13

25 **Q.** Okay. And can you describe the different teaching

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 positions that you have held?

2 **A.** Well, I have been an adjunct faculty member at  
3 C.W. Post University in New York. I have been an adjunct  
4 faculty at the University of Rhode Island. And my -- my  
5 primary teaching job is at Providence College, and I also  
6 teach seminars at Brown Medical School to the  
7 neuropsychology residents and fellows.

8 **Q.** All right. And are you board-certified?

9 **A.** I am in clinical neuropsychology.

10 **Q.** Clinical neuropsychology. What is that?

11 **A.** Neuropsychology is, essentially, the study of brain  
12 function through behavioral and psychological tests. So,  
13 it's the relationship between brain and behavior.

14 **Q.** All right. And are you board-certified in forensic  
15 psychology?

16 **A.** I am not.

17 **Q.** Do you have experience in forensic psychology?

18 **A.** Yes, I do.

19 **Q.** Can you describe that to the Court?

20 **A.** Well, I have some research and academic experience  
21 there. I have -- I have done research in malingering and  
22 malingering detection. I have co-authored a book chapter  
23 in the *American Psychological Association Handbook of*  
24 *Forensic Psychology*.

25 I have -- I teach a course in psychology

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 and law at Providence College. I also teach a seminar in  
2 forensic neuropsychology to the Brown neuropsychology  
3 postdocs and fellows. I -- and I have been involved in  
4 forensic consultation of various types over the years.

02:03:59

5 **Q.** And have you been -- have you acted as -- well, an  
6 expert witness in -- in court cases before?

7 **A.** Yes, I have.

8 **Q.** And have you been qualified as an expert and  
9 testified in court?

02:04:10

10 **A.** Yes, I have.

11 MR. LOONAM: Your Honor, at this time we move  
12 to recognize the witness as an expert in forensic  
13 psychology and neuropsychology.

14 THE COURT: He is so recognized.

02:04:31

15 BY MR. LOONAM:

16 **Q.** You conducted an examination -- or more than one  
17 examination of the defendant, Bob Brockman, in this case.  
18 Correct?

19 **A.** Yes.

02:04:40

20 **Q.** And did you do that in connection with what's known  
21 as "The Forensic Panel"?

22 **A.** Yes.

23 **Q.** What is The Forensic Panel?

02:04:53

24 **A.** The Forensic Panel is a national medical and forensic  
25 sciences practice.

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 Q. Okay. And can you describe your work for The  
2 Forensic Panel?

3 A. On this case or just in general?

4 Q. In general.

02:05:01

5 A. In general. So, I have worked with The Forensic  
6 Panel on a few different cases, either as what's called a  
7 primary examiner, someone who actually would evaluate the  
8 plaintiff or a defendant, or as a consultant, a peer  
9 reviewer where I would be part of a group of

02:05:23

10 neuropsychologists who might help to advise a primary  
11 examiner. And I have also done research on a topic that  
12 might be of interest to The Forensic Panel.

13 Q. All right. And in connection with this case, did you  
14 work together with other experts?

02:05:37

15 A. Yes, I did.

16 Q. Okay. And who did you work with?

17 A. So, the other experts that I worked with that were  
18 involved in the actual evaluation are Dr. Agronin,

19 Dr. Wisniewski, Dr. Whitlow, and then there were other

02:05:53

20 consultants in this case, neuropsychologists, Dr. Seward,  
21 Dr. Marcopolis and Dr. Goldberg, and then also Dr. Welner.

22 Q. Okay. Let's go through -- So, when it comes to those  
23 doctors that actually conducted the examination -- I think  
24 you described them as the primary examiner; is that

02:06:16

25 correct?

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 **A.** Yes. They would -- Right, the actual -- the -- the  
2 specialists who actually evaluated Mr. Brockman.

02:06:34

3 **Q.** Okay. And I think you described Drs. Agronin,  
4 Wisniewski and Whitlow. What roles did they play in  
5 connection with the examination of the defendant, Bob  
6 Brockman?

7 **A.** So Dr. Agronin is a specialist in geriatric  
8 psychiatry. So, that is his area of specialty.

02:06:48

9 Dr. Wisniewski -- I am not saying his name  
10 properly. It's --

11 **Q.** That's okay.

12 **A.** Dr. Wisniewski --

13 **Q.** I'd give it to you, but I can't lead.

02:07:02

14 **A.** -- fair enough -- is a neurologist with expertise in  
15 dementing disorders. Dr. Whitlow is a neuroradiologist.

16 **Q.** All right. And you mentioned that Dr. Agronin was a  
17 geriatric psychiatrist. What's that?

18 **A.** So, he has particular expertise in psychiatric  
19 illness of older adults.

02:07:18

20 **Q.** And was it important to you that this case had a  
21 geriatric psychiatrist conduct or participate in the  
22 primary evaluation of Mr. Brockman?

23 **A.** Yes.

24 **Q.** Why?

02:07:31

25 **A.** Well, because, first of all, Mr. Brockman is an older

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02:07:53

1 adult. And we're talking about a question of his mental  
2 capabilities and the possibility of a dementing disorder.  
3 Dr. Agronin sees those patients all the time. So, he  
4 would have particular expertise in the assessment of  
5 someone of Mr. Brockman's age and their mental state and  
6 other potential psychiatric illnesses that he might be  
7 suffering from.

02:08:06

8 **Q.** All right. And do you know how much you're paid for  
9 your work in this case?

10 **A.** Yes.

11 **Q.** How much?

12 **A.** I am paid \$325 an hour.

02:08:20

13 **Q.** \$325 an hour. And do you have a ballpark of how much  
14 total you're owed on this case? How much you have been  
15 paid and like what the grand total would be to date.

16 **A.** I don't know. I would guess somewhere around 70- or  
17 \$80,000.

18 **Q.** Okay. We'd have to do the math to figure out how  
19 many hours that is.

02:08:34

20 **A.** I don't -- A lot of hours.

21 **Q.** Yes. Okay.

02:08:48

22 Oh, and to close the loop, for  
23 the other professionals who act as sort of the consultants  
24 -- the peer reviewers, you called them, can you describe  
25 the role they play in The Forensic Panel's process?

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02:09:08

1 **A.** Yes. So, before I would go to evaluate the  
2 defendant, I would have a -- or there would be a  
3 conference call with the primary examiners as well as the  
4 reviewers, and we would go over the case and talk about  
5 the case.

02:09:29

6 I discuss the clinical and forensic  
7 aspects of the case. And they would help me -- they may  
8 make suggestions about my clinical assessment, hypotheses  
9 to consider, and I would incorporate that feedback into  
10 the -- into the assessment instruments that I chose to  
11 administer to Mr. Brockman and in my approach to the  
12 evaluation.

02:09:43

13 **Q.** And whose ultimate choice is it how you conduct your  
14 examination?

15 **A.** Well, it is ultimately mine.

16 **Q.** Yeah. And the opinions you have offered here, whose  
17 are they?

18 **A.** They are mine.

19 **Q.** Okay. What was the purpose of the examination?

02:09:54

20 **A.** The purpose of the examination was to determine if  
21 Mr. Brockman suffered from a mental disorder and, if so,  
22 would it affect his ability -- and would it affect his  
23 competence to stand trial.

02:10:13

24 **Q.** All right. And were there particular questions that  
25 were put to you in connection with your examination?

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1 **A.** Yes.

2 **Q.** And are those -- were those questions reflected in  
3 your expert report?

4 **A.** Yes.

02:10:26

5 **Q.** All right.

6 MR. LOONAM: I'm going to -- DX-22.

7 You don't need a copy of this, do you?

8 Here. I have it here. Save you the trouble.

9 BY MR. LOONAM:

02:10:47

10 **Q.** DX-22. All right. Are you able to see those  
11 questions?

12 **A.** Yes.

13 **Q.** All right. Will you read them to the Court?

14 **A.** "What does the data collected to date reflect upon

02:11:00

15 the nature of Robert Brockman's neuropsychological  
16 impairment?

17 What diagnoses are reflected in the recent  
18 history and current neuropsychological testing?

19 Is Mr. Brockman able, given the nature of  
02:11:11 20 the charges against him, to assist his attorneys with  
21 relevant requested facts, dates, and details?

22 Based on his performance in the testing,  
23 does Mr. Brockman demonstrate the mental stamina needed  
24 for a courtroom trial on the charges he faces?

02:11:26

25 Is Mr. Brockman able to assist his counsel



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1 in defending his case? Why or why not?

2 Does the evidence reflect that  
3 Mr. Brockman is malingering cognitive incapacitation?"

02:11:40

4 **Q.** Okay. And we will come back to these questions and  
5 answer them in more detail.

6 But can you just give us your sort of top  
7 line conclusions that you have reached after your  
8 examination of Mr. Brockman?

02:11:55

9 **A.** Yes. I am of the opinion that Mr. Brockman suffers  
10 from dementia and that his dementia negatively affects his  
11 ability to assist his lawyers in his own defense.

12 **Q.** And when you say "negatively affects his ability to  
13 assist his lawyers in his own defense," can you provide  
14 some details to the Court on what you mean by "negatively  
15 affects?"

02:12:21

16 **A.** That he is unable to provide, with a reasonable  
17 degree of rational understanding, information that will  
18 assist his lawyers in his own defense.

02:12:39

19 **Q.** Okay. And then is -- the language you are using  
20 there, is that -- is that a particular standard that  
21 you're referencing?

22 **A.** Well, it is, as I understand it, the Dusky Standard.

23 **Q.** And what is the Dusky Standard?

02:12:53

24 **A.** The Dusky Standard is relevant to whether a defendant  
25 has the ability to consult with his attorney with a

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1 reasonable degree of rational understanding, and whether  
2 he has a rational as well as factual understanding of the  
3 proceedings against him.

02:13:12

4 **Q.** And as far as you observed, what part of the Dusky  
5 Standard do you believe is really at issue in this case?

6 **A.** The first one, the issue of his ability to consult  
7 with his attorney with a reasonable degree of rational  
8 understanding.

9 **Q.** Okay. Are you aware of different cognitive domains?

02:13:29

10 **A.** Yes.

11 **Q.** And what are the different cognitive domains?

02:13:44

12 **A.** Well, it depends upon how you want to slice up the  
13 pie, so to speak. But generally speaking we talk about  
14 things like attention. One's ability to simply attend to  
15 information that's happening in the environment, and to  
16 block out information that's not relevant.

17 Working memory, which is the ability to  
18 keep something in your head at any given moment, and then  
19 to perform some mental operation on it.

02:13:59

20 We think about mental processing speed,  
21 how rapidly someone is able to think through problems and  
22 process information.

02:14:11

23 Certainly memory and learning, how well a  
24 person is able to absorb new information, retain it, and  
25 then recall it later.

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1 Visual spacial function, how well someone  
2 is able to, for example, navigate their physical world.

3 Problem solving and judgment, which are  
4 also part of a group of skills called executive functions,  
02:14:28 5 that have to do with how well someone is able to regulate  
6 their behavior, organize themselves, plan, use problem  
7 solving strategies to get to a desired endpoint. It also  
8 involves things like motivation and perseverance.

9 **Q.** And with respect to your top line conclusions, and we  
02:14:49 10 will drill down into these, which of these cognitive  
11 domains do you believe are impaired with respect to  
12 Mr. Brockman?

13 **A.** I think all of them are. Excuse me. I also should  
14 add -- I didn't mention language functions. I should have  
02:15:11 15 mentioned language functions, that's one of the major  
16 cognitive domains. And, however, language functions are  
17 an area that still seem to be a relative strength with  
18 Mr. Brockman.

19 So certainly his attention, his working  
02:15:25 20 memory, his processing speed, his memory and learning, and  
21 his executive functions are all areas that would adversely  
22 affect his ability to participate in his own defense.

23 **Q.** Okay. And you mentioned that language function is  
24 relatively preserved. You know, based on what you  
02:15:47 25 observed with respect to how the cognitive domains of

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1 Mr. Brockman have been impaired, do you have, you know,  
2 a -- a belief with respect to what type of dementia you  
3 believe Mr. Brockman is suffering from?

02:16:14

4 **A.** I believe that his clinical presentation or his  
5 neuropsychological test data or profile at this point are  
6 most consistent with Parkinson's disease dementia.

7 **Q.** All right. And in addition to Parkinson's disease  
8 dementia, do you believe that there may be a -- a  
9 coexisting diagnosis?

02:16:34

10 **A.** It certainly is quite possible, yes.

11 **Q.** And what is that?

12 **A.** Alzheimer's disease.

13 **Q.** And prior to conducting your examinations of  
14 Mr. Brockman, did you review materials in connection with  
15 this case?

02:16:56

16 **A.** Yes, I did.

17 **Q.** And what types of materials did you review?

18 **A.** I reviewed medical records. I reviewed e-mails. I  
19 reviewed testimony. I reviewed prior neuropsychological  
20 test results. I -- there were hundreds of documents.

02:17:16

21 **Q.** Okay. And can you describe for the Court just  
22 generally the categories of information you relied on to  
23 reach your opinion?

24 **A.** Well -- well, I relied certainly on his medical  
25 records, reports from physicians, the neurodiagnostic

02:17:34

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1 studies, reports of other neuropsychological test results.

2 I also relied on some collateral  
3 information from Mrs. Brockman and from others, and then  
4 certainly my own test results and observations of  
5 Mr. Brockman.

02:17:59

6 **Q.** Okay. And then I don't know if I -- if I heard or  
7 not, but are you familiar with whether or not there was  
8 any neuroimaging done on Mr. Brockman?

9 **A.** Yes. I had -- right. Yes. But I also mentioned the  
10 -- the neuroimaging that was conducted was also part of  
11 what I reviewed.

02:18:13

12 **Q.** Okay. And when did you conduct your examinations of  
13 Mr. Brockman?

14 **A.** The first time I saw him was in July. I think the  
15 13th and 14th of July. And the second time was October  
16 2nd.

02:18:28

17 **Q.** Okay. So July 2021 and October 2021?

18 **A.** Yes.

19 **Q.** Okay. All right. You testified that part of your  
20 opinion is based in part on neuropsychological testing  
21 conducted by others and neuropsychological testing that  
22 you conducted, is that accurate?

02:18:45

23 **A.** Yes.

24 **Q.** Can you describe for the Court just generally what  
25 neuropsychological testing is?

02:18:59

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1 **A.** Sure. So, neuropsychological testing really is  
2 composed of a series of mental tasks that we ask patients  
3 to do. Some are strictly verbal, asking them questions,  
4 asking them to memorize a list of words. Some are paper  
5 and pencil. Some are computer administered. But they are  
6 designed to assess various aspects of thinking skills in  
7 an individual.

8 **Q.** Okay. And when -- you know, when are these typically  
9 administered, like what are these used for?

10 **A.** Oh, so they're used clinically for patients where  
11 there is either a question of some cognitive impairment,  
12 whether due to, let's say, normal aging or some  
13 degenerative disorder like dementia, or it can be due to a  
14 question of someone has sustained a brain injury from a  
15 concussion, or from a car accident, or from a brain tumor,  
16 or cognitive impairments from a psychiatric illness.

17 Sometimes we know a patient has brain  
18 damage because they have been in a coma for two weeks, and  
19 so sometimes the evaluation is to determine what's the  
20 nature and severity of the deficit and how much do the  
21 impairments affect the person's ability to, let's say, go  
22 back to work, or go back to school, handle their finances,  
23 things like that.

24 **Q.** And, you know, in the context of diagnosing a  
25 cognitive impairment, are there occasions when you have to

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1 take -- well, do you always have to take into account the  
2 risk of secondary gain?

3 **A.** Yes, when present.

4 **Q.** Okay. And what is that?

02:20:42

5 **A.** Secondary gain is motivation for someone to either  
6 create or exaggerate impairment, either for some gain,  
7 financial gain, let's say, or to avoid some aversive  
8 event, like military service or prison.

9 **Q.** Yeah. Or criminal prosecution?

02:21:06

10 **A.** Yes.

11 **Q.** So, for example, in this case, this is a clear case  
12 where there is secondary gain present at the time of your  
13 examination, correct?

14 **A.** Oh, yes.

02:21:19

15 **Q.** How do the tests account for the risk of secondary  
16 gain and somebody just faking it?

17 **A.** How do the tests in general?

18 **Q.** Well, yeah, do the tests in general account for it  
19 and have some tests, you know, developed, you know,  
02:21:35 20 specific mechanisms to try and catch the fakers?

21 **A.** Yes. So, some tests have built-in safeguards where  
22 there are certain indicators within a test that tell us  
23 that individuals even with severe brain damage do well on  
24 this kind of test.

02:21:52

25 And then there are other tests that are --

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1 that have been created specifically to try to detect  
2 people who might be trying to fake brain damage.

3 Then there are other tests that we give  
4 that are -- that don't play any specific role in the  
02:22:08 5 detection of poor effort, or trying to assess for  
6 secondary gain.

7 **Q.** Okay. And are you familiar with -- with what I'll  
8 call the Green tests?

9 **A.** Yes.

02:22:19 10 **Q.** I mean, what are the Green tests?

11 **A.** So the Green tests are three different tests of  
12 validity. They are computer-administered. One is called  
13 the Word Memory Test, one is called the Nonverbal Medical  
14 Symptom Validity Test, and the third is simply the Medical  
02:22:40 15 Symptom Validity Test.

16 And these are three, as I said,  
17 computer-administered measures that were designed and  
18 created specifically to try to detect people who might be  
19 trying to fake especially a memory deficit or memory  
02:22:53 20 impairment.

21 **Q.** Okay. Now, on -- with respect to these tests, is  
22 there a challenge in connection with administering these  
23 tests, in a -- an elderly population?

24 **A.** Yes.

02:23:08 25 **Q.** Okay. Can you describe that to the Court?

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02:23:27

1 **A.** Yes. So early on in the development of these tests,  
2 they were given largely to help to try to identify people  
3 who were trying to fake brain damage from a concussion for  
4 a mild brain injury, and so we gathered a lot of data,  
5 "we" meaning the field, gathered a lot of data on patients  
6 who had sustained a concussion or maybe a moderate to  
7 severe brain injury and we would give them these tests and  
8 see how they would perform.

02:23:40

9 And they're relatively easy tests to do  
10 for the most part and so the test developers presume that,  
11 well, because they're easy to do, we can give these to  
12 anyone who we think might be faking brain damage and they  
13 should all do well on them.

02:23:53

14 However, as we began to give them to  
15 special populations, like individuals with very low IQ, or  
16 individuals who were much older, or patients with  
17 dementia, we found that -- in fact that many of these  
18 tests were failed by older adults and by patients with  
19 dementia and by patients with low IQs.

02:24:10

20 So, what was happening then, was that  
21 there was a recognition that these tests were generating  
22 what we call false positive errors, meaning identifying  
23 someone as producing an invalid test profile because they  
24 weren't trying hard enough, or they were trying to fake  
25 brain damage, when in fact they were failing because they

02:24:24

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1 were so impaired.

2 **Q.** Well, a couple of questions from that.

3 So, first, this isn't the time to be  
4 modest. You said "the field." Did you participate in the  
5 -- the early days of developing these -- these sort of  
6 validity tests to check the validity of neuropsychological  
7 testing?

8 **A.** Yes.

9 **Q.** And did you even develop your own test at one point?

10 **A.** Yes, I did, although it didn't get very far.

11 **Q.** Okay. Okay. And you said that, you know, they were  
12 failing the tests because they were so impaired.

13 Can you describe to the Court some of the  
14 reasons why, you know, someone might receive an invalid  
15 score, and -- other than they're exaggerating their  
16 symptoms?

17 **A.** Oh, yes. So sometimes patients will -- will -- will  
18 produce a score that is in the invalid range, meaning that  
19 we think that the performance is not valid. It doesn't  
20 accurately reflect their abilities.

21 And sometimes it's due to a lack of effort  
22 or sometimes it's due to trying to fake brain damage.  
23 Sometimes it's due because the patient is too tired,  
24 exhausted. They're having a bad day. They are just not  
25 engaged in the testing. They are angry to have to be

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02:26:23

1 tested, some especially older adults who might not want to  
2 be exposed as having some impairment. They may be very  
3 resistant to testing and so when you try to test them,  
4 they just sort of -- they give up quickly. They don't  
5 care. They don't try. And so you can get a failure on  
6 these validity tests for reasons other than the fact that  
7 someone is intentionally trying to do poorly for some  
8 other -- for some secondary gain purpose.

02:26:40

9 **Q.** Understood. And you described before that there is a  
10 challenge administering these tests to patients with  
11 dementia.

12 Can you just describe that in a little  
13 more detail, what the challenge is with respect to  
14 administering these tests with patients with dementia?

02:26:52

15 **A.** Well, sometimes it is difficult just to engage them  
16 in the testing process. Sometimes older adults when they  
17 are referred for dementia evaluations, they -- they don't  
18 always appreciate the nature of their deficits. They feel  
19 embarrassed, humiliated, and so sometimes it is difficult  
20 just to engage them in testing.

02:27:08

21 At other times, though, even for those  
22 patients who are engaged in testing, the test is just too  
23 hard. So they get an invalid score because the test  
24 doesn't always discriminate well among those people who  
25 are really impaired and those who are only mildly or

02:27:26

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02:27:50

1 moderately impaired, and so they can appear, based on the  
2 test results, to be producing an invalid profile, that  
3 then becomes a chore for the examiner to determine whether  
4 or not is this low score on this validity test low because  
5 a person is trying to fake brain damage or is it low  
6 because they actually are impaired?

02:28:10

7 **Q.** Okay. And let's cover the Green tests first. Did  
8 the Green tests on -- have a mechanism to identify those  
9 individuals, or to attempt to identify those individuals  
10 with dementia who are having low scores, as opposed to the  
11 fakers who have low scores?

12 **A.** Yes. Yes.

13 **Q.** And what is that mechanism?

02:28:25

14 **A.** Well, and so to the credit of the Green tests, there  
15 are mathematical formula built into each of the Green  
16 tests, that if a person fails, that is get a score below  
17 the cutoff, their test scores are analyzed by a computer  
18 program that will then determine whether or not this  
19 profile is reflective of a possible genuine memory

02:28:47

20 impairment, meaning this is how dementia patients can  
21 perform, or is this profile due to someone who was likely  
22 simulating or faking brain damage.

02:29:12

23 **Q.** Okay. And are you familiar with any research about  
24 the sensitivity of the Green tests in detecting the fakers  
25 versus those who have, you know, genuine memory

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1 impairment?

02:29:36

2 **A.** Well, certainly, the -- there are -- to -- so the --  
3 the Green tests, when you asked, for example, individuals  
4 to simulate brain damage on the Green tests, depending on  
5 how many of the Green tests you give, then the Green tests  
6 can be quite good at identifying individuals who are  
7 trying to fake brain damage from those who actually have  
8 genuine memory impairment.

02:29:53

9 **Q.** And when you say you give them a combination, you  
10 know, the particular study, if you give the three Green  
11 tests in one sitting, and -- are the fakers able to  
12 generate a genuine memory impairment profile across all  
13 three tests?

02:30:16

14 **A.** No. No. Even individuals -- graduate students, for  
15 example, in psychology who were asked to fake dementia on  
16 the Green tests were -- no one was able to fake dementia  
17 across all three of the Green tests.

02:30:37

18 **Q.** Okay. Now, for -- the tests other than the Green  
19 tests, there are a whole battery of validity tests that  
20 are not the Green tests, correct?

21 **A.** Oh, yes.

02:30:49

22 **Q.** And we are going to discuss them all here today, but,  
23 you know, what are some of the ways you can account for  
24 the possibility that somebody is suffering from dementia  
25 in administering those other tests that don't have the

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1 sort of mathematical algorithm to try and identify the  
2 genuine memory impairment issue?

3 **A.** Well, if I -- if I understand correctly, then one  
4 needs to calibrate differently the cutoff scores for these  
02:31:11 5 tests for information that we have with -- with known  
6 dementia patients who are believed to have been putting  
7 forth adequate effort on measures, and so then we would  
8 need to change the cutoff scores to accommodate older  
9 individuals who have a much higher rate of failure than  
02:31:35 10 younger individuals, and older individuals with dementia  
11 who have a much higher rate of failure than individuals  
12 without dementia.

13 So we are -- we need to make that -- we  
14 need to change the calibration of what we consider to be  
02:31:47 15 cutoff.

16 **Q.** And as a baseline, how are those tests typically  
17 calibrated? What's the pool of folks that are setting the  
18 sort of default baseline for those validity tests?

19 **A.** Generally, they are not -- although more have been  
02:32:03 20 recently, but generally they are not individuals with  
21 dementia. That is not who they tend to be given to for  
22 the most part.

23 There have been some studies that have  
24 certainly -- and so that's very helpful to help us  
02:32:14 25 understand what kind of a normal range of scores is on

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1 these measures. But, historically, the normative data on  
2 many of these tests have been for -- with middle-aged  
3 adults, or individuals with more moderate to severe  
4 traumatic brain injuries rather than dementia.

02:32:33

5 **Q.** Okay. And so what do you do to the cutoff scores to  
6 adjust them, to account for the possibility that you're  
7 administering the test to a dementia patient?

8 **A.** Well, you -- you typically have to then lower the  
9 score.

02:32:49

10 **Q.** And that -- I mean, to translate that, does that mean  
11 you make it easier?

12 **A.** You don't make the test easier. You make the -- the  
13 cutoff point for invalidity lower.

02:33:09

14 **Q.** Okay. Yeah. It's like -- you know, like -- like a  
15 -- my kid has a spelling test and you have to get seven  
16 out of ten to pass, right? You would change it to make it  
17 six out of ten to pass?

18 **A.** So, maybe if your child has a learning disability,  
19 then you would maybe not want to have his score be  
20 different from kids without a learning disability, so in  
21 your analogy that's the way I would see it.

02:33:25

22 **Q.** Okay. And were there batteries of neuropsychological  
23 testing administered to Mr. Brockman throughout the  
24 pendency of this case?

02:33:46

25 **A.** I'm sorry, "were?" Sorry.

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1 Q. Yeah. Well, how many different neuropsychological  
2 testing -- scratch that.

3 You conducted neuropsychological testing  
4 on Mr. Brockman, correct?

02:33:58

5 A. Yes.

6 Q. Who else conducted neuropsychological testing on  
7 Mr. Brockman?

8 A. Dr. Denney and Dr. York.

9 Q. Okay. And who was first in time?

02:34:09

10 A. Dr. York.

11 Q. Okay. Can you describe the -- the  
12 neuropsychological -- let's put it this way.

13 Across all the neuropsychological testing  
14 that Dr. York conducted, that Dr. Denney conducted, that  
15 you conducted, can you describe for us what that testing  
16 showed about Bob's cognitive functioning and his  
17 impairment, if any?

02:34:26

18 A. Yes. So, essentially the -- the neuropsychological  
19 testing across multiple testing sessions revealed that  
20 Mr. Brockman's performance on the majority of measures of  
21 mental abilities fell well below the average range.

02:34:46

22 Q. Okay. And, I guess, in connection with sort of the  
23 tests across time, doing a longitudinal analysis, do you  
24 see any progression with respect to his testing scores?

02:35:14

25 A. Yes. I mean, it's not necessarily easy because



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1 everybody doesn't give the same test.

2 So, it is not as if he had the same  
3 battery across every single measure, but there were some  
4 measures that -- that were more commonly given.

02:35:30

5 Having said that, from my perspective, I  
6 thought that from the early neuropsychological measures to  
7 the later ones, Mr. Brockman was showing a decline,  
8 especially with his mental processing speed, with his  
9 mental stamina, and with his sustained attention.

02:35:49

10 **Q.** Okay. And was there an area where he was  
11 consistently poor?

12 **A.** His memory was consistently poor. His digital  
13 spacial skills were consistently poor. His language  
14 functions though, again, especially his naming abilities,  
15 his vocabulary remained consistently good.

02:36:05

16 **Q.** Okay. So, then, I guess, if Mr. Brockman's scores  
17 are valid, in the context of the other information  
18 available to you, what does that mean? What does that  
19 mean to you? What's your opinion with respect to his  
20 competence to stand trial?

02:36:32

21 **A.** Well, so, with the level of impairment that he  
22 demonstrates, that in my opinion would make it -- he would  
23 be unable to assist his lawyer in his own defense with any  
24 rational understanding of the information that he had to  
25 help them with.

02:36:57

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1 Q. And, so, then, let's focus on the validity tests,  
2 then, that were administered over time for Mr. Brockman.

3 Did Dr. York -- well, who is Dr. York?

02:37:21

4 A. Dr. York is a neuropsychologist at the Baylor College  
5 of Medicine.

6 Q. And did Dr. York administer validity tests during her  
7 neuropsychological testing?

8 A. Yes.

02:37:30

9 Q. And do you recall which validity tests she  
10 administered?

11 A. Dr. York saw Mr. Brockman three times. She  
12 administered the Reliable Digit Span, all three times, and  
13 on the second evaluation she also administered another  
14 validity measure called the Rey-15 Item Test.

02:37:48

15 Q. And what is the Reliable Digit Span, performance  
16 validity test?

17 A. That has to do with how many digits you can repeat  
18 consistently in forward and backward order, and you  
19 essentially add up the number of digits in forward order  
20 that you can recite consistently and the number of digits  
21 backward you can recite consistently and that sum is  
22 called the Reliable Digit Span.

02:38:05

23 Q. And do you recall approximately when the first time  
24 Dr. York examined Mr. Brockman?

02:38:20

25 A. March of 2019.

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1 Q. Okay. And -- and how did Mr. Brockman do on that  
2 performance validity test?

3 A. His performance fell in the valid range.

4 Q. The valid range. He passed?

02:38:32

5 A. Yes.

6 Q. And what does that -- what does that mean? Is that  
7 -- with respect to his effort that he is putting forth?

02:38:48

8 A. Well, that means that at least on that measure, his  
9 performance was considered to be valid. There was no  
10 evidence of excessive impairment or deficit that would  
11 render the test results invalid.

12 Q. Okay. You had also mentioned -- well, do you know  
13 the next time that Mr. Brockman was examined by Dr. York?

14 A. December 2019. Or October.

02:39:08

15 Q. October 2020?

16 A. No. No, because it was March 2019, the first  
17 evaluation. The second evaluation -- I think that was  
18 December of 2019.

19 Q. December -- that's right. December 2019 is correct.  
20 I'm sorry. So there is -- and you issued the Rey-15 test?

02:39:22

21 A. The Rey 15-Item Test.

22 Q. What is that?

23 A. That's another validity measure in which someone is  
24 shown a -- 15 stimuli, asked to memorize them. They are

02:39:37

25 put away, and then they are asked to draw as many of them

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1 as they can.

2 Q. Okay. And how did Mr. Brockman do on the Rey 15-Item  
3 Test when administered by Dr. York at Baylor University?

4 A. He also passed it at that -- Wait. I shouldn't say  
5 "he also." He passed it at that time.

6 Q. And was there -- you know, is there an optional  
7 component to the Rey 15-Item Test?

8 A. Yes. There is also a -- a recognition component,  
9 which Dr. York did not administer.

10 Q. Okay. And what's the significance of that, the fact  
11 that she didn't administer the recognition piece of it?

12 A. Well, I think that now the recognition part --  
13 portion -- The original Rey-15 test was just those 15  
14 items that you would show someone and then take it away  
15 and then have them draw it from memory.

16 One of the problems with that measure was  
17 that people with real brain damage were failing it. So, a  
18 researcher added a recognition component because that  
19 added -- that allowed a patient who may have not done as  
20 well on the recall portion to do better on the recognition  
21 portion. We know that brain-damaged people generally do  
22 better with recognition. So, this was trying to eliminate  
23 the false positive errors, that is, calling someone a  
24 malingerer when, in fact, they are not.

25 Q. Understood. And -- and then during that same

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1 December examination, did Dr. York again administer the  
2 Reliable Digit Span?

3 **A.** Yes, she did.

4 **Q.** And how did Mr. Brockman do?

02:41:08

5 **A.** Mr. Brockman passed it.

6 **Q.** Okay. And then was there another test that -- that,  
7 I had, jumps to in October?

8 **A.** Yes, October 20.

02:41:25

9 **Q.** Yeah. And did Dr. York administer a performance  
10 validity test then?

11 **A.** Yes.

12 **Q.** And how did he do?

13 **A.** She administered again the Reliable Digit Span, in  
14 which Mr. Brockman passed.

02:41:33

15 **Q.** Okay. Now, can you -- do you have -- do you have a  
16 view of Dr. York's -- well, did -- is this a sufficient  
17 number of validity tests to conduct a forensic  
18 examination?

19 **A.** No.

02:41:59

20 **Q.** Why not?

21 **A.** Because when -- in a forensic evaluation there is  
22 more of a risk for trying to exaggerate or embellish or  
23 fake deficits. And, so, multiple performance validity  
24 tests should be given and are given in forensic -- in  
02:42:22 25 forensic-related examinations.

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1 Q. Okay. And did you -- did you just accept Dr. York's  
2 findings at face value?

3 A. What do you mean by that?

02:42:41

4 Q. Did you just, you know, adopt and accept her testing  
5 as -- you know, without a critical eye?

02:42:59

6 A. No. I mean, they are -- they are data points. There  
7 are some problems with her validity testing, especially,  
8 because her last two evaluations, she described them as  
9 forensic evaluations. So, she did not administer the  
10 appropriate number of performance validity tests, and  
11 so -- so, it's -- it's data, but it's also flawed data.

12 Q. Okay. I am going to direct you to Page 22 of your  
13 report. You don't need to pull it out. I am going to  
14 pull it up on the ELMO.

02:43:23

15 MR. LANGSTON: Do you want a copy or are you  
16 good?

17 MR. SMITH: No. I got it.

18 BY MR. LOONAM:

02:43:36

19 Q. Okay. DX-19. Okay. It's your original report. And  
20 I am going to direct you to this paragraph here, and what  
21 are you saying in this paragraph here?

02:43:58

22 A. Well, I am, again, saying that, in forensic  
23 evaluations, Dr. York administered essentially just two  
24 performance validity indicators, and she should have  
25 administered more than that.

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1 Q. Okay. So, to the extent somebody testified in this  
2 court that you accepted Dr. York's tests at face value and  
3 didn't -- without criticism, that would be incorrect?

4 A. Correct.

02:44:15

5 MR. LOONAM: Your Honor, I don't know when is a  
6 good time to break. I can go for a while. But whatever --

7 THE COURT: I know we have been going for an  
8 hour and 45 minutes.

9 MR. LANGSTON: I am happy to go.

02:44:24

10 THE COURT: Well, let's go ahead and take our  
11 break now, then. We will be back at 3:00 and then we will  
12 push on.

13 MS. LOONAM: Sure.

02:44:31

14 THE COURT: I don't have anything this  
15 afternoon, so we can keep rolling.

16 MR. LANGSTON: Yes, sir. Great.

17 THE COURT: Let's take a break until around  
18 3:00, thereabouts.

19 (Proceedings recessed from 2:44 p.m. to 3:15 p.m.)

03:15:41

20 THE COURT: You may continue.

21 MR. LOONAM: Thank you, Your Honor.

22 Can we switch over to the screen? I am  
23 going to go back and forth, but just trying -- I'm going to  
24 help -- there's a lot of tests, so to help keep us

03:15:51

25 organized.

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 BY MR. LOONAM:

2 Q. So, these are the Dr. York performance validity test  
3 results that you just testified to. Right, Doctor?

4 A. Yes.

03:16:00

5 Q. So, the Reliable Digit Span in March of 2019; the  
6 Rey-15 test without recognition on December 3rd, 2019; the  
7 Reliable Digit Span on December 3rd, 2019; and the  
8 Reliable Digit Span on October 7th, 2020. Correct?

9 A. Yes.

03:16:19

10 Q. Okay. And, as you testified before, in the context  
11 of a forensic examination, that's not a sufficient number  
12 of validity tests. Correct?

13 A. Correct.

14 Q. The next battery of neuropsychological testing was  
15 conducted by whom?

03:16:41

16 A. Dr. Denney.

17 Q. Do you recall approximately when that was?

18 A. May.

19 Q. Okay. There is too much there. Let me go back.

03:16:54

20 Okay. And do you know -- do you recall  
21 which tests Dr. Denney administered?

22 A. He administered the Word Memory Test. He  
23 administered, I believe, the Nonverbal Medical Symptom  
24 Validity Test, Reliable Digit Span, Victoria Symptom

03:17:20

25 Validity Test. He administered a clinical test called



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1 "Sentence Repetition" that includes an embedded validity  
2 test, although he didn't count it as such, but -- Perhaps  
3 he didn't know about it or -- I'm not sure what. But,  
4 anyway, there is an embedded validity test in the Sentence  
5 Repetition test.

6 And he also administered the Denney  
7 competency related test, which he did not identify as a  
8 validity measure, but its structure -- it's, I think, 114  
9 items with a forced-choice format, meaning that an  
10 examinee has to respond with either one answer or the  
11 other. And the forced-choice format is very common among  
12 performance validity tests because it forces someone to  
13 make a choice, and if you look at the choices that they  
14 make over the course of several trials you can determine  
15 if -- what's the probability of someone getting that score  
16 based on chance alone.

17 So, it's -- even though Dr. Denney didn't  
18 describe it as a performance validity test, certainly in  
19 format it presents as such, from my perspective.

20 **Q.** Okay. And when you have a forced-choice validity  
21 test, can you describe for the Court sort of the three  
22 options that exist as the results of that test.

23 **A.** Well, so, a -- a forced-choice validity test means  
24 that you give someone an option of -- you're testing,  
25 typically, their memory. And, so, you may say, so, I --

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1 so, I just put my pen in my hand, or a pencil, and you  
2 hide it from the person, and then you have them count, and  
3 then you say, 'Now, did I hide the pen or the pencil?'  
4 And, so, the idea is that, for someone who truly has a  
5 severe memory disorder, they should get around chance. If  
6 they get significantly less than chance, then the theory  
7 is that the person knew the right answer, but they gave  
8 the wrong answer.

9 And so -- and then there are various  
10 cutoffs that have been established that are above chance  
11 but that are typically obtained by individuals even with  
12 memory impairment.

13 **Q.** Okay. And, so, I think that covers the list you just  
14 described for us.

15 The Reliable Digit Span performance  
16 validity test administered by Dr. Denney in May of 2021,  
17 how did Mr. Brockman perform?

18 **A.** His score fell in the valid range.

19 **Q.** The Sentence Repetition test, what is that?

20 **A.** So the Sentence Repetition test is, really, just what  
21 it describes. It is a test in which a person is asked to  
22 repeat as verbatim, beginning just small phrases, getting  
23 longer and longer, more and more words, sentences, longer  
24 sentences, and it measures verbal working memory. To be  
25 able to repeat a sentence you have to be able to keep the

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1 information in your head and then -- and then spit it back  
2 out. And, so, there have been established cutoffs for  
3 individuals who are believed to be producing an invalid  
4 result on the Sentence Repetition test.

03:20:47

5 Mr. Brockman's score fell within the valid  
6 range.

7 **Q.** Now, the Denney competency related test, you said  
8 this is a forced-choice test. You consider it sort of --  
9 since it's forced choice, it's -- acts as a validity test.

03:21:04

10 What's the subject matter of that test?

11 **A.** The subject matter of that test is to look at the  
12 examinee's legal knowledge, various terms, concepts,  
13 really sort of testing their knowledge of the legal  
14 system.

03:21:23

15 **Q.** All right. And how did -- and, so, factual knowledge  
16 regarding the legal system?

17 **A.** Yes. Where -- excuse me -- where each question has  
18 two answers; one is correct and the other is incorrect.

19 **Q.** Okay. You know, can you think of an example?

03:21:41

20 **A.** I, actually -- no, I can't.

21 **Q.** Okay.

22 **A.** Sorry.

23 **Q.** Okay. But -- but related to -- to legal matters?

24 **A.** Yes. And, as the title indicates, related to

03:21:54

25 competency.

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1 Q. Yeah. And how did Mr. Brockman perform on  
2 Dr. Denney's designed, you know, competency-related,  
3 forced-choice test in May of 2021?

03:22:15

4 A. Mr. Brockman's -- if memory serves me correctly, he  
5 got 87 percent correct.

6 Q. And so well above chance?

7 A. Well above chance.

03:22:30

8 Q. And what's the significance of that for you in  
9 evaluating Mr. Brockman's effort level and whether or not  
10 he's malingering?

11 A. So, this test in particular from my -- especially,  
12 would really tap into Mr. Brockman's presentation, how he  
13 wishes to present himself with regard to his legal  
14 knowledge as it relates to his competence.

03:22:50

15 So, from my perspective, if he is going to  
16 try to malingering incompetence to stand trial, this would be  
17 an ideal place to do it. For him to be able to -- if he were  
18 to get a significantly poor score, gets very, very few  
19 correct, that would -- on its face validity, would suggest  
20 that then he -- how can he be competent because he doesn't  
21 know, sort of, the basics of the legal system? But his  
22 performance fell well above chance and, in fact, fell  
23 generally within the average range. And, so, not only did  
24 he pass this as a validity measure, but this is a validity  
25 measure that has -- whose content is, from my perspective,

03:23:12

03:23:29

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1 directly related to the issue of competence.

2 Q. Yeah. And I am making this up. We can go back and  
3 get it and you can be crossed on it. But would an example  
4 be, you know, 'At the beginning of the case, you're  
5 presumed innocent or you're presumed guilty?'

6 A. That would be the kind of thing.

7 Q. 'Pick one?'

8 A. Yes.

9 Q. So -- Okay. And, so, he got a valid there.

10 And then there's the Green Word Memory  
11 Test. What is Dr. Green's Word Memory Test?

12 A. That is a computer-administered measure in which an  
13 individual is shown 20 word pairs twice. Then the words  
14 go away. And then the person is shown on a computer one  
15 of the words of the pair and another word that was not on  
16 the list. So, that would be a foil. And they have to go  
17 through and they have to recognize the words that were on  
18 the original list.

19 Q. Okay. And what was the -- the result obtained by --  
20 well, what was the result obtained -- Well, hold on. Let  
21 me do it this way.

22 I am going to show the witness -- can we  
23 go back to the ELMO -- DX-59 in evidence. Here we go.  
24 Let me see if I can do a little -- Tell me -- Your screen  
25 is different than mine, so you just make sure you can see

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1 that. Okay?

2 **A.** Uh-huh.

3 **Q.** Are you able to see that?

4 **A.** Yes.

03:25:21 5 **Q.** Okay. And what is this?

6 **A.** This is the printout for the Word Memory Test.

7 **Q.** And is this the printout for the Word Memory Test  
8 administered by Dr. Denney on May 19th, 2021?

9 **A.** Yes.

03:25:35 10 **Q.** Okay. And so just tell us, just generally, what this  
11 represents.

12 **A.** So, this represents Mr. Brockman's Word Memory Test  
13 scores being run through the advanced interpretation  
14 software such that Mr. Brockman -- Mr. Brockman's scores  
03:25:57 15 on the subtests that are used to determine whether it's  
16 valid or not, fell in the invalid range. So, however, as  
17 I mentioned earlier, individuals can perform in the  
18 invalid range with a genuine memory impairment.

19 So, what this shows here is the decision  
03:26:13 20 tree or, actually, the decision tree that the computer is  
21 going through, the program is going to -- going through,  
22 that identifies that, in fact, that Mr. Brockman did not  
23 pass the Word Memory Test, but, upon further examination,  
24 the -- his scores on some of the easy subtests and some of  
03:26:34 25 the difficult subtests resulted in what is referred to as

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1 a genuine memory impairment profile.

2 Q. Okay. And so -- so -- and, you know, when we hear  
3 "pass," "fail," "valid," "invalid," at least as a  
4 layperson, it triggers a reaction in me that may lead to a  
03:26:55 5 misunderstanding; and, so, I want to try and clear that  
6 up.

7 A dementia patient with -- with, you know,  
8 moderate dementia, what is the expectation as to what they  
9 would score in the valid-invalid range?

03:27:13 10 A. Well, individuals with dementia are at a much higher  
11 risk of failing this test --

12 Q. Uh-huh.

13 A. -- failing most tests or, if you will, producing  
14 scores that fall in the invalid range.

03:27:28 15 Q. Uh-huh. And that -- as you testified earlier, is  
16 that why Dr. Green developed this possible genuine memory  
17 impairment profile, to identify those individuals?

18 A. Yes.

19 Q. Okay. And, so, if you go through sort of the  
03:27:41 20 decision tree algorithm here -- and then it takes you to  
21 two options. What's the option at the top?

22 A. "Poor effort profile."

23 Q. Okay. And "poor effort profile," are those the  
24 identified fakers?

03:27:56 25 A. I'm sorry?

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1 Q. Are those the identified fakers?

2 A. Yes. Yes.

3 Q. And then below that is what box?

4 A. The "possible genuine memory impairment."

03:28:07 5 Q. And the fact that it's bolded here, what does that  
6 signify?

7 A. That means that's the -- that's the outcome of the  
8 mathematical formula or the mathematical analysis of the  
9 results.

03:28:18 10 Q. Okay. And, so, up until this point in the box, is  
11 this all sort of computer algorithm that's identifying the  
12 possible genuine memory impairment profile?

13 A. Yes.

14 Q. Okay. So, there is -- and then after it, the two  
03:28:33 15 boxes after it, are those sort of computer algorithms or  
16 are those subjective clinical judgment?

17 A. So, then the other two boxes, essentially, are -- are  
18 referring the -- the clinician, the examiner, to other  
19 data that they would need to look at to either confirm or  
03:28:56 20 rule out the possible general memory impairment.

21 Q. Okay. And what sort of other data do you look at to  
22 confirm or rule out the possible genuine memory impairment  
23 profile?

24 A. Well, then you would essentially use your clinical  
03:29:13 25 judgment to -- You would look at medical history. You

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03:29:33

1 would look at other test results. You would look at a  
2 person's everyday functional abilities. You would look at  
3 neuroimaging data. You would look at all other clinical  
4 information to arrive at a conclusion as to whether or not  
5 your opinion would be that this person actually suffers  
6 from a possible genuine memory impairment.

03:29:49

7 **Q.** Okay. And then the last box talks about, you know,  
8 "Interpret relative to appropriate comparison groups." We  
9 are going to discuss this in some detail, but can you just  
10 give the Judge sort of a high level as to what this is?

11 **A.** Sure. To then also look at an individual's responses  
12 relative to other groups that may be similar in diagnosis.

03:30:08

13 **Q.** Okay. All right. But -- we will get to that, but,  
14 for now, on the Word Memory Test administered by  
15 Dr. Denney in May 2021, Mr. Brockman's score qualified as  
16 a possible genuine memory impairment profile. Correct?

17 **A.** Yes.

18 **Q.** And I think you testified that Dr. Denney also  
19 administered the Nonverbal MSVT. Correct?

03:30:30

20 **A.** Yes.

21 **Q.** What is that?

22 **A.** The Nonverbal Medical Symptom Validity Test.

23 **Q.** And what is that test?

03:30:46

24 **A.** It's the same basic principle in terms of asking  
25 someone to learn a series of drawings, some of which go

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1 together or many of them go together. Again, it's a  
2 learning task but this time with nonverbal pictures,  
3 nonverbal information, rather than words.

03:31:09

4 **Q.** Okay. I am going to show you what is marked as  
5 DX-60. Are you able to see this?

6 **A.** Yes.

7 **Q.** Okay. And what is it?

8 **A.** It is the advanced interpretation printout for the  
9 Nonverbal Medical Symptom Validity Test.

03:31:18

10 **Q.** And for both the -- the MSVT and the nonverbal MSVT,  
11 can you just describe to the Court how is that  
12 administered? Like what does the patient do? I  
13 understand there are pictures or, you know -- but with  
14 respect to the computer, what happens?

03:31:32

15 **A.** So, the entire thing is computer-administered.  
16 The -- the stimuli are presented on a computer screen. An  
17 individual responds by either using a mouse or -- or a  
18 touch screen, and that is how most of the test is  
19 administered. There are a couple of subtests in which the  
20 examiner asks the questions, but the questions are  
21 generated on the computer, and you answer the questions  
22 right on the computer.

03:31:55

23 **Q.** And this scoring -- where is the scoring maintained?

03:32:12

24 **A.** The scoring happens within the computer -- the Green  
25 effort test platform.

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1 Q. Okay. And -- and when it goes to -- Do you say there  
2 is an AI function? What is that?

3 A. Right. An advanced interpretation function.

4 Q. All right. You pay extra for that?

03:32:23

5 A. You do.

6 Q. And what does that do for you?

7 A. That will take the scores from the original test, and  
8 it will run it through the algorithms that you see here.

9 Q. All right. Is that a computerized process, the

03:32:37

10 transferring of those scores to the AI?

11 A. Yes. Yes.

12 Q. So, it's not as if you have any hand in that?

13 A. No.

14 Q. Or Dr. Denney had any hand in that --

03:32:43

15 A. No.

16 Q. -- at that point?

17 So, this scoring sheet looks a little  
18 different, but I see here it says, "Data could be valid,  
19 but apply Slick, et al. criterion." Is that the same as  
20 a -- a possible genuine memory impairment profile, just  
21 collapsing those boxes we saw before?

03:32:59

22 A. Yes.

23 Q. Okay. That's DX-60. You -- you also testified that  
24 in May of 2021 Dr. Denney administered what's known as the

03:33:22

25 Victoria Symptom Validity Test. Correct?

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1 **A.** Yes.

2 **Q.** Now, the Victoria Symptom Validity Test, does it have  
3 a built-in mechanism to try to identify dementia patients  
4 who -- who, you know, the test is being administered to?

03:33:40

5 **A.** No.

6 **Q.** Now, the Victoria Symptom Validity Test -- are  
7 there -- well, what are the risks with respect to  
8 administering this test to a potential dementia patient?

03:34:03

9 **A.** There is always a risk with any performance validity  
10 test, including the Victoria Symptom Validity Test, that  
11 an individual with dementia will score below the cutoffs  
12 recommended by the test and identify the individual with  
13 dementia falsely, as either malingering or not putting  
14 forth adequate effort when, in fact, they may have.

03:34:23

15 **Q.** Okay. And what is -- like, how does the test work?

16 **A.** It's a digit recognition test. A person is shown a  
17 five-digit number for a certain number of seconds. The  
18 number goes away. And then -- so, it's also computer-  
19 administered. And then two-digit numbers -- or two five-  
20 digit numbers are shown, the original number and the foil,  
21 and the person has to choose the number that they just  
22 saw.

03:34:41

23 **Q.** Okay. And is it broken down into easy and hard  
24 items?

03:34:53

25 **A.** Yes.

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1 Q. Okay. And -- and does the test have a -- come with a  
2 manual?

3 A. Yes, it does.

4 Q. Okay. And what is included in the manual?

03:35:06

5 A. The manual includes scoring guidelines or  
6 interpretive guidelines, the psychometric properties of  
7 the test, some examples of individuals who have taken the  
8 test.

03:35:21

9 Q. All right. And when you enter this -- you do this  
10 Victoria Symptom Validity Test, is it also computerized?

11 A. Yes.

12 Q. And are the results also spit out by a machine?

13 A. Yes.

03:35:35

14 Q. All right. In interpreting the Victoria Symptom  
15 Validity Test, what was Dr. Denney's interpretation of  
16 Mr. Brockman's performance?

03:35:54

17 A. So, the -- the interpretive guidelines for the -- for  
18 the test is there are -- there are three different  
19 interpretations. There is -- depending upon the number of  
20 errors that a person makes, there is a score that is  
21 simply acceptable. There is a score that's questionable,  
22 in which someone answers around chance. And then there is  
23 below chance. And the manual give s specific cutoffs, how  
24 many items do you need to get correct to be in the chance  
03:36:15 25 range or below the chance range.

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1 So, Dr. Denney focused on the difficult  
2 word pair tasks, in which Mr. Brockman got eight out of 24  
3 correct, which, according to the manual, is in the chance  
4 range. Dr. Denney interpreted that as being below chance.

03:36:40

5 **Q.** So, in doing that, did Dr. Denney follow the manual?

6 **A.** No.

7 **Q.** So, he -- he changed the testing criteria from the  
8 manual put out by the Victoria Symptom Validity Test.  
9 Correct?

03:36:53

10 **A.** Correct.

11 **Q.** And what did he base his -- or use to justify moving  
12 the testing criteria to change the cutoff?

13 **A.** As I understand it, he said that the manual lists  
14 significantly below chance as a score that would happen by  
15 chance 5 percent of the time or less.

03:37:14

16 When he included eight -- eight correct  
17 out of 24 as being significantly below chance, that  
18 actually was more like 8 eight percent rather than  
19 5 percent chance.

03:37:34

20 So -- and from what I understand, he -- he  
21 claimed that he was justified in doing that because the  
22 symptom validity -- the Victoria Symptom Validity Test was  
23 published back in the '90s, and we now have a different  
24 understanding of what significantly below chance is. And,  
25 so, therefore, he felt justified in essentially raising

03:37:53

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1 the bar to call Mr. Brockman's score "chance" to then  
2 "below chance."

03:38:14

3 Q. Okay. And is that true, that there's now some  
4 agreement as to what represents "significantly below  
5 chance"?

03:38:31

6 A. In my opinion, no. There is no consensus within the  
7 field as to what constitutes "significantly below chance."  
8 There are individuals who have written articles who  
9 endorse various levels, 10 percent, 20 percent, but the  
10 field has not come to a consensus about what  
11 "significantly below chance" should be.

12 Q. And what's the basis for your understanding of where  
13 the field stands on this?

03:38:43

14 A. Just this spring in the *Journal of the Clinical*  
15 *Neuropsychologist* there was a statement from a consensus  
16 conference that was held by the American Academy of  
17 Clinical Neuropsychology that assembled a number of  
18 experts around the country -- I actually participated in  
19 that same conference in 2009 -- in which they made a  
20 statement regarding the neuropsychological assessment of  
21 effort, response bias, and malingering. And in that  
22 document the -- there -- they don't say, "We have no  
23 consensus," but they never state a consensus about what  
24 "significantly below chance" means. They only use that  
25 term and never quantify it in any objective manner.

03:39:02

03:39:19

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1 Q. And having participated in that conference, what  
2 inference are you drawing from the absence of a  
3 definition?

03:39:30

4 A. That there was no consensus on what significantly  
5 below chance should actually mean mathematically.

6 Q. So, there is that part of it, but then you said there  
7 are articles that -- that talk about, you know, the  
8 different values.

03:39:40

9 By the way is this called the p-value when  
10 you are trying to calculate what significantly below  
11 chance means?

12 A. Yes.

13 Q. And what is the typical p-value used in social  
14 science papers?

03:39:49

15 A. .05.

16 Q. And what is the value used in the Victoria Symptom  
17 Validity Test?

18 A. According to the manual it's .05.

03:39:59

19 Q. Uh-huh. So it follows sort of the standard that is  
20 used in social science, correct?

21 A. Yes.

22 Q. And then -- but Dr. Denney used a different p-value?

23 A. Correct.

03:40:08

24 Q. And are you familiar with whether he based his moving  
25 the goal posts of the test on a particular article?

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1 A. Yes. I believe so.

2 Q. And what article is that?

3 A. That is an article by Loring.

4 Q. Uh-huh.

03:40:18

5 A. And --

6 Q. And that article -- does that article have a  
7 statement specifically on the risk of moving the goal  
8 posts on dementia patients?

9 A. Yes.

03:40:31

10 Q. What does it say?

11 A. The authors conclude that individuals with dementia  
12 are more at risk for getting low scores or chance scores  
13 on the Victoria Symptom Validity Test, and as a result a  
14 chance score should be interpreted as a false positive  
15 error.

03:40:51

16 In other words, so to indicate that in the  
17 chance level, performance is due to inadequate effort, the  
18 authors of the article say that -- that that  
19 interpretation should not be used because dementia  
20 patients are at risk more than other patients with it --  
21 of having their scores fall within that chance range.

03:41:10

22 THE COURT: Is the article in evidence?

23 MR. LOONAM: We have pointed to it before and  
24 used it. I don't know if it was entered into evidence, but

03:41:24

25 I am happy to enter it into evidence, Your Honor. I can

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1 get a copy for Your Honor.

2 THE COURT: I would like to read the entire  
3 article.

4 MR. LOONAM: Sure. Yeah.

03:41:37

5 THE COURT: I didn't mean to interrupt. Maybe  
6 later. Maybe later.

7 MR. LOONAM: Sure. Sure. We will get Your  
8 Honor a copy of the article. I think we used it during our  
9 cross of Dr. Denney.

03:41:51

10 BY MR. LOONAM:

11 Q. And, you know, during his cross-examination, I  
12 believe, my memory is that Dr. Denney agreed that in  
13 administering validity tests, the cutoff needed to be  
14 adjusted for dementia patients? Do you agree with that  
15 testimony?

03:42:12

16 A. Oh, yes.

17 Q. And I believe Dr. Denney agreed that the cutoffs to  
18 account for dementia patients, on the analyzing validity  
19 tests, would need to be made easier, or -- or --

03:42:27

20 A. Lower.

21 Q. -- or lower the cutoff?

22 A. Yes.

23 Q. Do you agree with that testimony?

24 A. Yes.

03:42:31

25 Q. Is that what Dr. Denney did in this Victoria Symptom

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1 Validity Test?

2 **A.** No, he did not.

3 **Q.** What did he do?

4 **A.** He actually increased the score. If you just follow  
03:42:42 5 the manual, Mr. Brockman's score falls within the chance  
6 range. However, Dr. Denney sort of lowered -- he -- he  
7 made it -- he took a chance range score and made it below  
8 chance, which increased the likelihood of failure.

9 **Q.** To continue the sports metaphor that was started  
03:43:08 10 earlier today, is it fair to say he moved the goal posts?

11 **A.** Yes, I would say that.

12 **Q.** Okay. I am going to show you what is DX-65, and do  
13 you recognize DX-65?

14 **A.** Yes.

03:43:25 15 **Q.** And what is DX-65?

16 **A.** This looks like the Victoria Symptom Validity Test.  
17 This is a printout of the scores, of the summary scores of  
18 Mr. Brockman.

19 **Q.** And in the context of the Victoria Symptom Validity  
03:43:37 20 Test scoring system, what does "questionable" equal?

21 **A.** So that's the interpretation, that that's at chance.

22 **Q.** Chance?

23 **A.** Chance.

24 **Q.** Yeah. Yeah. So sometimes it's past, valid, chance,  
03:43:50 25 questionable, fail, invalid? Is that fair?

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1 **A.** There are -- right. There are multiple terms that  
2 are used.

3 **Q.** Yeah. Each test has its on sort of vocabulary?

4 **A.** Yes.

03:44:01

5 **Q.** Okay. And, in addition, does the manual for this  
6 test guide the examiner in what the most objective and --  
7 and reliable measure is of effort?

8 **A.** Yes.

9 **Q.** And what is that?

03:44:18

10 **A.** The total items correct is what the manual recommends  
11 to be used in the determination of the -- the  
12 interpretation of this test.

13 **Q.** And -- and did -- in reaching his analysis did  
14 Dr. Denney rely on the combined score, or did he rely on  
15 singling out one score?

03:44:39

16 **A.** He did not rely on the total score, rather he relied  
17 just on the difficult items.

18 **Q.** And is that consistent with the manual for the  
19 Victoria Symptom Validity Test?

03:44:51

20 **A.** No, it is not.

21 MR. LOONAM: Can we go back to the screen?

22 BY MR. LOONAM:

23 **Q.** So, this is where we were on Dr. Denney's test, and  
24 as far as you have testified, Reliable Digit Span, valid;

03:45:19

25 Sentence Repetition test, valid; Denney Competency-Related

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03:45:37

1 Test, valid; Green Word Memory Test, Genuine Memory  
2 Impairment Profile, Green Nonverbal Medical Symptom  
3 Validity Test, Genuine Memory Impairment Profile, and  
4 Victoria Symptom Validity Test was a chance performance,  
5 correct?

6 **A.** Yes.

7 **Q.** Who administers the next battery of  
8 neuropsychological tests?

9 **A.** I do.

03:45:55

10 **Q.** And in-between Dr. Denney's tests in May -- and when  
11 do you conduct your tests?

12 **A.** July.

13 **Q.** Okay. Is there any incident of significance with  
14 respect to Mr. Brockman's health?

03:46:06

15 **A.** Yes. He was admitted for urosepsis and delirium from  
16 late May to early June, or I guess really mid June, and  
17 then also underwent a general anesthesia for the UroLift.

18 **Q.** And the urosepsis hospitalization, were there any  
19 incidents that concerned Mr. Brockman's mental health?

03:46:34

20 **A.** I'm sorry. I don't quite understand the question.

21 **Q.** Well, in his July -- in his June hospitalization --

22 **A.** Yes.

23 **Q.** -- in addition to urosepsis, did -- did Mr. Brockman  
24 suffer from episode s of delirium?

03:46:51

25 **A.** Oh, yes. Yes.

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1 Q. Okay. And what's the significance of that?

2 A. Well, there are a couple of things. One is that it  
3 reflects the fragility of his brain function, that an  
4 infection can result in his altered mental status, and  
03:47:07 5 confusion and -- and also that given his -- that delirium  
6 can result in a permanent decline in cognitive function or  
7 brain function, even when it resolves mostly, for some  
8 patients delirium doesn't go away completely and patients  
9 are left with a lower baseline than when they started.

03:47:32 10 Q. Okay. And so in the July tests -- describe your  
11 examination in July. What were your interactions with  
12 Mr. Brockman and your observations?

13 A. Well, I interviewed him. I administered a number of  
14 different neuropsychological tests as well as performance  
03:47:55 15 validity tests. And you asked what my impression was?

16 Q. Yes. What was your impression during the interview  
17 portion of Mr. Brockman?

18 A. I was struck by how easily confused he was, how off  
19 track he was at times. He would certainly have moments  
03:48:12 20 when he was -- when he seemed to understand what I was  
21 there for and could respond appropriately, but at other  
22 times he would say things that were really unrelated to my  
23 questions.

24 He thought at various times that I was a  
03:48:27 25 consultant for Reynolds and Reynolds, that I was helping

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1 with a computer program. Sometimes I simply couldn't  
2 follow his -- his train of thought.

3 He had difficulty following some  
4 instructions on test measures. His endurance was  
03:48:45 5 significantly decreased. I couldn't get through nearly  
6 what I -- what Dr. Denney was able to do in one day in May  
7 versus what I tried to do in two days in July. So there  
8 were a number of cognitive issues.

9 **Q.** And had you watched the videotaped interview of the  
03:49:06 10 interview conducted largely by Dr. Agronin, but together  
11 with Dr. Denney, back in May? Or Dr. Dietz. I'm sorry, I  
12 misspoke. I'm sorry. Strike it, let me rephrase.

13 Did you watch the videotape of the -- the  
14 interview conducted largely by Dr. Dietz but also with  
03:49:25 15 Dr. Denney back in May?

16 **A.** Yes, I did.

17 **Q.** Okay. And can you compare your -- what you observed  
18 when you examined Mr. Brockman in person in July, versus  
19 what you observed in the videotape in May?

03:49:42 20 **A.** Yes. From May to July I found that his -- his mental  
21 status had really changed significantly. He was not  
22 nearly as attentive. He was more easily confused. He was  
23 less able to stay on track. His mental endurance was  
24 decreased, his mental processing speed was decreased. He  
03:50:05 25 looked much worse with regard to his mental status.

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1 Q. Okay. And that's -- and what do you attribute that  
2 to?

3 A. I attribute that to the progression of his dementia,  
4 and especially the effects from his delirium in late May  
5 and June.

6 Q. Okay.

7 A. And also -- and the possibility of some effect  
8 possibly of his general anesthesia for his UroLift in  
9 later June.

10 Q. So the anesthesia combined with the delirium episodes  
11 and the progression?

12 A. Yes.

13 Q. Okay. Did you administer performance validity tests  
14 in connection with your examination of Mr. Brockman?

15 A. Yes, I did.

16 Q. Which tests did you administer?

17 A. I administered the Medical Symptom Validity Test, the  
18 Test of Memory Malingered, the A-Test, the Rey 15-Item  
19 Test with Recognition, the Coin-in-the-Hand Test, Reliable  
20 Digit Span. I think that is all of them.

21 Q. The RBANS?

22 A. The -- the RBANS was a test -- a general  
23 neuropsychological test for which they had embedded  
24 validity measures in it, so they were not stand-alone.

25 Q. So, the RBANS Effort Index and the RBANS Effort



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1 Scale?

2 **A.** Yes.

3 **Q.** Okay. And when you said -- can you describe for the  
4 Court the difference between the Stand-Alone Validity Test  
5 and an Embedded Validity Test?

03:51:42

6 **A.** Sure. So, a Stand-Alone Validity Test is a test that  
7 is -- for which the only purpose is to assess for effort  
8 and validity. And Embedded Validity Test is a test that  
9 has been -- or a score perhaps, or a combination of  
10 scores, that have been derived from a regular clinical  
11 neuropsychological test, something that you would give a  
12 patient to assess some aspect of their functioning from  
13 which you can draw out indicators that are sensitive to  
14 inadequate effort and validity.

03:52:01

15 So those tests do what is called sort of  
16 double duty. They can both provide important clinical  
17 information, as well as provide information about validity  
18 and effort.

03:52:20

19 **Q.** Okay. I think one of the tests you mentioned was  
20 the -- is it the TOMM, the Test of Memory Malinger?

03:52:31

21 **A.** Yes.

22 **Q.** And so what is that test?

23 **A.** That is another forced choice test, where an  
24 individual is shown a series of pictures, asked to  
25 remember them, and then they're later shown two choices

03:52:44

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1 from which they are asked to then pick the picture that  
2 they had seen before.

3 **Q.** And how did Mr. Brockman do on the TOMM?

4 **A.** Mr. Brockman obtained a valid range score on the  
5 TOMM.

6 **Q.** Okay. And in his report, did Dr. Denney criticize  
7 your administration of this test?

8 **A.** He did.

9 **Q.** Okay. And why -- what did Dr. Denney take issue  
10 with?

11 **A.** Dr. Denney said that I should have administered --  
12 there is -- there are two learning trials, and then there  
13 is a Delayed Recall Trial. Dr. Denney thought that I  
14 should have also administered the Delayed Recall Trial, or  
15 a retention trial.

16 **Q.** And, well, what's your response to Dr. Denney?

17 **A.** I disagree with that. It a purely optional trial.  
18 The clinicians that I know tend to not administer the  
19 retention trial because the trial already takes a long  
20 time to administer, and there is a number of studies that  
21 have looked at the TOMM that don't even look at the  
22 retention trial.

23 So I don't see it at all as being critical  
24 in the assessment of malingering with the use of the TOMM.

25 **Q.** And can you explain for the Court the interplay

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1 between the time you have -- the time management,  
2 especially with respect to the elderly in administering  
3 these tests?

03:54:14

4 **A.** Yes. So always with -- with older adults, endurance  
5 can be a problem. They tend to work more slowly than  
6 younger adults. They have less endurance. They fatigue  
7 more quickly.

03:54:29

8 So you are always trying to maximize your  
9 evaluation by sort of front loading it with the most  
10 important things. In any sort of shopping list of  
11 neuropsychological tests, there are those that you really  
12 want to give, those that you would like to give, and those  
13 that if you have time you'll give for more and more  
14 information.

03:54:44

15 So in Dr. -- in Mr. Brockman's case, in  
16 July his endurance was such, his attention was such, that  
17 I felt I had a limited amount of time to be able to really  
18 get an optimal performance from him because his endurance  
19 and his ability to persist were -- were so low.

03:55:04

20 **Q.** All right. You had mentioned the Coin-in-the-Hand  
21 Test?

22 **A.** Yes.

23 **Q.** Okay. What is that?

03:55:16

24 **A.** That is simply you put a coin in your hand. The  
25 examinee sees which hand it's in. You then close both

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1 palms. You ask the person to close their eyes, count  
2 backwards from ten and then when they open their eyes to  
3 identify which coin the hand -- which hand the coin was  
4 in.

03:55:30

5 **Q.** And how did Mr. Brockman perform on the  
6 Coin-in-the-Hand Test?

7 **A.** Mr. Brockman obtained a valid range score.

8 **Q.** Okay. The A-Test, what is that?

03:55:51

9 **A.** The A-Test is -- occurs when you read a series of  
10 letters at the rate of one every other second, and the  
11 examinee is to signal, tap on the table, for example,  
12 every time the letter "A" is said.

13 **Q.** And how did Mr. Brockman perform?

03:56:08

14 **A.** So Mr. Brockman made more errors -- he made more  
15 errors. His error rate was above the cutoff for validity,  
16 but while giving the test, he seemed to be sort of out of  
17 it. He seemed to be staring off into space. He didn't  
18 seem to be paying attention.

03:56:27

19 So what I typically do in those cases is  
20 when I finish the test, I then ask the patient -- first of  
21 all, What was it that I asked you to do, to make sure that  
22 they had remembered the instructions. Because if you fail  
23 the A-Test because you don't remember the instructions  
24 that has nothing to do with effort, that has to do with  
25 their mental status.

03:56:40

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03:56:56

1 So when I asked Mr. Brockman that  
2 question, and his comments are in my report, he -- he  
3 produced some unusual comments like I couldn't quite  
4 follow what he was thinking, but he seemed to be quite  
5 confused. When I asked him what I had asked him to do, he  
6 couldn't tell me.

03:57:07

7 I said, 'Well, I read a series of letters.  
8 What did you want me to do with them -- what did you think  
9 I wanted you to do?' He said, 'Remember them.' Which was  
10 completely wrong.

03:57:21

11 So my -- my thought about his performance  
12 on that task was -- was that he did not perform well  
13 because he was simply -- he became too confused in the  
14 middle of it.

03:57:39

15 So I tried to reorient him, remind him why  
16 I was there, who I was, what the evaluation was all about.  
17 I gave him the instructions. I asked him to repeat the  
18 instructions. I think I did that a couple of times until  
19 finally I felt that he was sort of back on track and then  
20 I readministered the test.

03:57:49

21 **Q.** So is the A-Test one of those tests like the Green  
22 tests that accounts for dementia patients and has a  
23 genuine memory impairment profile?

24 **A.** No, it does not.

25 **Q.** And so in your clinical judgment, you -- you observed

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1 that -- that the defendant was confused and did not  
2 understand the task at hand?

03:58:07

3 **A.** I felt that the -- that he initially understood the  
4 task at hand. But then as the tasks persisted, he did  
5 not. He lost track of what he was supposed to do.

6 **Q.** Okay. And then you readministered the test -- tell  
7 us, how many times do you have to instruct him on -- to  
8 make sure he understood this -- the task at hand?

9 **A.** I think at least a couple of times.

03:58:21

10 **Q.** And is that something you have done in your clinical  
11 practice to try and see if you can get in administering  
12 these tests to patients with short-term memory problems?

03:58:44

13 **A.** Yes. Or -- when I see patients, and -- and they are  
14 responding to any test in a way that doesn't make sense,  
15 that just seems random, or just they're responding in a  
16 way that makes me think that they don't know what their --  
17 it is that they are supposed to do, that they -- that they  
18 seem to understand the instructions when I started, but  
19 then midway through the test they start responding in ways  
20 that just don't make much sense, then I will -- typically  
21 I will either stop the test, or let the test go through to  
22 completion, and then we will ask them, 'What did you  
23 remember I asked you to do?' And then if they don't know  
24 that, then I will -- I will give them the directions again  
25 and re-administer the test.

03:59:02

03:59:17

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1 Q. And -- and I don't know if it was respect to this  
2 test, or another test, but during his testimony Dr. Denney  
3 accused you of coaching the defendant on these tests.

03:59:35

4 Did -- are you familiar -- are you aware  
5 of that?

6 A. Yes.

7 Q. Okay. And what is your response to Dr. Denney's  
8 accusation that on these tests, that you coached the --  
9 the defendant?

03:59:46

10 A. I never coached the defendant. I readministered the  
11 instructions, but I -- I simply gave the instructions  
12 again as they are to be given. I didn't tell him how he  
13 should do on the test. I didn't coach him on how to  
14 succeed on the test. I only gave him the directions  
15 again.

04:00:07

16 Q. You readministered the test and did you disclose the  
17 procedures you used in your report that was disclosed to  
18 Dr. Denney?

19 A. Yes.

04:00:14

20 Q. And after you reoriented the defendant and instructed  
21 him several times on the test, what -- what score did the  
22 defendant receive?

23 A. He obtained a valid range score.

24 Q. Okay. And what's the RBANS Effort Index?

04:00:33

25 A. So that is a -- the RBANS is the Repeatable Battery

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1 Assessment of Neuropsychological Status, and there are two  
2 built-in embedded validity indicators and Mr. Brockman  
3 obtained valid range scores on both of those.

4 Q. Okay. On effort on the index and on the scale?

04:00:53

5 A. Yes.

6 Q. And then the Medical Symptom Validity Test you have  
7 already discussed, correct?

8 A. Yes.

9 Q. And I am going to put up DX-61.

04:01:06

10 MR. LOONAM: Can we go back? I'm sorry. Thank  
11 you, sir.

12 BY MR. LOONAM:

13 Q. And do you recognize DX-61?

14 A. Yes.

04:01:20

15 Q. What do you recognize it to be?

16 A. Sorry?

17 Q. What do you recognize it to be?

18 A. Oh, this is the advanced interpretation printout of  
19 the Medical Symptom Validity Test that was administered to  
20 Mr. Brockman in July.

04:01:30

21 Q. Okay. And what does it reflect with respect to the  
22 algorithm part, the math part of the flow chart?

23 A. Right. It, again, reflects that Mr. Brockman  
24 produced a possible genuine memory impairment profile.

04:01:52

25 Q. Okay. And then you testified that you also -- let



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1 me make sure I am here. You also administered the  
2 Reliable Digit Span?

3 **A.** Yes.

4 **Q.** Okay. And how did the defendant do?

04:02:12

5 **A.** Mr. Brockman obtained a valid range score on the  
6 Reliable Digit Span.

7 **Q.** Okay. And did you administer the Rey 15-Item Test  
8 With Recognition during your July exam?

9 **A.** Yes, I did.

04:02:37

10 **Q.** And how did Mr. Brockman do?

11 **A.** Well, as we have discussed previously, the original  
12 cutoff scores for the Rey 15-Item Test With Recognition  
13 are far too high for people over the age of 60 and  
14 especially those with dementia. And so there have been  
15 suggestions for alternate scoring and alternate cutoff  
16 scores for that.

04:02:59

17 So using the alternate cutoff scores for  
18 individuals with -- for older individuals and individuals  
19 with dementia, Mr. Brockman obtained valid range scores.

04:03:18

20 THE COURT: May I ask a quick question?

21 MR. LOONAM: Of course.

22 THE WITNESS: Yes.

23 THE COURT: Doctor, is there a consensus that  
24 this accommodation for scores should be done, or is that on  
25 a practitioner by practitioner -- on a practitioner -- on a

04:03:30

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1 practitioner-by-practitioner basis, or is there some  
2 consensus that needs to be adjusted?

3 THE WITNESS: Yes, so there -- there is a  
4 consensus that -- that individuals with dementia,  
04:03:46 5 individuals with very severe traumatic brain injury with a  
6 long period of unconsciousness, individuals with very  
7 severe mental disorders like schizophrenia, that they  
8 will -- that as a group, those folks, patients in those  
9 groups will score lower on performance validity tests and  
04:04:06 10 will -- and will not pass as many performance validity  
11 tests. And so scores have to be adjusted to accommodate  
12 those groups.

13 BY MR. LOONAM:

14 Q. And that's widely recognized, correct?

04:04:16 15 A. Yes.

16 Q. In the literature, that to account for dementia  
17 patients, you need to adjust the cutoff scores to account  
18 for a dementia patient?

19 All right. And did you also administer  
04:04:28 20 the Conners CPT 3 validity test?

21 A. So the -- the -- the Conners CPT 3 is not a validity  
22 test.

23 Q. Okay.

24 A. It's a Continuous Performance Test that measures  
04:04:39 25 sustained attention.

KATHY MILLER, RMR, CRR - kathy@millers-reporting.com

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 Q. I see. I see. And how was Mr. Brockman's sustained  
2 attention?

3 A. It fell well below normal. And, however, the CPT 3  
4 does generate a validity comment that -- that because the  
04:04:59 5 number of errors that Mr. Brockman made raised a concern,  
6 either that the person didn't understand the directions,  
7 was severely impaired, or was not putting forth adequate  
8 effort.

9 MR. LOONAM: Okay. All right. Can we bring up  
04:05:17 10 the other screen, and see -- I think, so -- and I think  
11 this is -- let's see here.

12 BY MR. LOONAM:

13 Q. So this covers the validity tests, but does not  
14 include the Conners embedded -- it sounds like it's an  
04:05:36 15 embedded function?

16 A. It is not even really an embedded function per se.

17 Q. So it's not a validity test; is that fair?

18 A. It is not. But the computer program will alert the  
19 examiner if there are more errors than typically  
04:05:52 20 encountered.

21 Q. Okay. And so what -- what was the next evaluation of  
22 the defendant after your July exam?

23 A. I believe it was my October 2nd exam.

24 Q. Okay. And what validity tests did you administer in  
04:06:11 25 the October 2nd exam?

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THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 **A.** The medical symptom validity test, Reliable Digit  
2 Span, Coin-in-the-Hand Test, Rey 15-Item Test With  
3 Recognition.

4 **Q.** And did you also administer the A-test again or --

04:06:32

5 **A.** I don't recall offhand.

6 **Q.** Yeah. No. Fair enough. It would be in your report.  
7 Let me make sure I am not leading you astray.

8 **A.** I think I did.

04:06:59

9 **Q.** Yeah. The Rey-15 test. How did Mr. Brockman score  
10 on the Rey-15 test during your administration in October?

11 **A.** Again, he produced valid range scores.

12 **Q.** And you administered that with the recognition piece?

13 **A.** Yes.

04:07:16

14 **Q.** Does Dr. Denney take issue with your scoring on the  
15 Rey-15 test that you are aware of?

16 **A.** Yes. And he cites the same article that I did.  
17 Dr. Denney indicates that there are two -- without getting  
18 too deep into the weeds, there are -- the article by  
19 Fazio, who arguably has published the biggest paper on the  
20 Rey 15-Item Test with an older population and with a  
21 demented population.

04:07:39

22 So, Fazio suggested a new combination  
23 score and then does not, however, list a cutoff, simply  
24 says, if -- if you plug these variables into this score,  
25 then a score less than two is uncommon. That -- that's

04:07:59

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 all Fazio says. He does not say that it makes it invalid.  
2 Indicating, however, the percent of individuals who score  
3 less than two, or one and zero.

04:08:19

4 And then, however, Fazio and colleagues  
5 say but even a better way of looking at the performance on  
6 the Rey 15-Item Test With Recognition is by doing a  
7 pattern analysis, and they list three separate scores that  
8 an individual can generate from the Rey 15-Item Test. And  
9 they say, if you fail three of these, three of these, then

04:08:39

10 this is what they describe as a pathognomonic marker, or  
11 sign, of a likely disingenuous profile, because no one in  
12 our sample gets all of these three wrong. Zero percent  
13 does.

04:08:58

14 So, I calculated both the pattern analysis  
15 profile as well as the new combination score, and on both  
16 of those -- well, on the most important one, arguably, the  
17 pattern analysis score, Mr. Brockman's performance fell  
18 within the valid range.

04:09:13

19 Q. Okay. And you are not going to make me say that, the  
20 term patho --

21 A. Pathognomonic.

22 Q. -- pathognomonic. So, when you looked at the sort  
23 of -- the combination of the three sets, Mr. Brockman  
24 obtained a valid score; is that accurate?

04:09:29

25 A. Yes.

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 Q. Okay. On the A-Test how did he do?

2 A. He produced a valid range score. I believe he made  
3 two errors, and the cutoff is more than two errors.

4 Q. Reliable Digit Span?

04:09:40

5 A. A valid range score.

6 Q. And then the -- the Green Medical Symptom Validity  
7 Test?

8 A. Right. He produced a possible genuine memory  
9 impairment profile.

04:09:58

10 MR. LOONAM: All right. Can we switch over?

11 BY MR. LOONAM:

12 Q. All right. Again, reflected here --

13 A. Yes.

14 Q. -- in Defense Exhibit 62.

04:10:23

15 And then on the -- did you also administer  
16 the Coin-in-the-Hand Test in October?

17 A. Yes, I did.

18 Q. Okay. And how did Mr. Brockman do?

19 A. So, the -- the general cutoff recommended is seven

04:10:41

20 correct or fewer, and Mr. Brockman obtained a score of  
21 seven, which is, technically, an invalid score, although,  
22 again, if you look at the literature on the  
23 Coin-in-the-Hand Test, for a moderate to severe dementia  
24 group, at least one study found that five out of 20 people  
25 failed it. And, in fact, if you look at the range of

04:11:01

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1 scores on the Coin-in-the-Hand Test, some dementia  
2 patients got as few as five correct. So, Mr. Brockman had  
3 seven correct.

04:11:15

4 So, while it's technically an invalid  
5 range score, I -- arguably, again, modifying that score  
6 for someone in his age group and someone with his  
7 diagnosis, you could also call that a valid range score.

8 **Q.** Yeah.

04:11:29

9 **A.** I would also add that the interesting thing that --  
10 the qualitative observation of Mr. Brockman was that, when  
11 you put the coin in the hand and then you close both hands  
12 like this (indicating) to make a fist, Mr. Brockman is  
13 watching me do this, and when I make the fist he does this  
14 (indicating). He does the same thing.

04:11:45

15 He's basically -- he is mimicking my  
16 behavior, which is a very unusual thing to see. There's a  
17 name for it. It's called "echopraxia." And it can  
18 reflect damage to some frontal lobe structures, because  
19 he's -- it's like he is -- he sees what I am doing and --  
20 and he suddenly mimics that behavior. And that's  
21 something that you see with patients with brain damage.

04:12:03

22 **Q.** Okay. And that's -- can you spell that for the court  
23 reporter?

24 **A.** E-C-H-O-P-R-A-X-I-S [sic].

04:12:20

25 **Q.** And then -- so, it's accurately reflected here up on

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

04:12:39

1 the screen. You know, the Rey-15, A-Test, Reliable Digit  
2 Span were valid; the Green Medical Symptom Validity Test,  
3 Genuine Memory Impairment Profile, and the coin in the  
4 test [sic] is the seven out of the ten that you just  
5 described. Correct?

6 **A.** Yes.

7 **Q.** And then the next battery of neuropsychological  
8 testing was administered by?

9 **A.** Dr. Denney.

04:12:48

10 **Q.** Also in October?

11 **A.** Yes.

12 **Q.** Okay. And do you recall what performance validity  
13 tests Dr. Denney administered?

04:13:08

14 **A.** The Medical Symptom Validity Test, the Nonverbal  
15 Medical Symptom Validity Test, um...

16 **Q.** How about --

17 MR. LOONAM: Is it fair if I refresh the  
18 witness's recollection?

19 MR. SMITH: Sure.

04:13:16

20 MR. LOONAM: Any objection?

21 MR. SMITH: No.

22 THE COURT: Of course.

23 **A.** Reliable Digit Span, again, and Rey-15 test with  
24 recognition.

04:13:22

25 BY MR. LOONAM:



THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 Q. Okay. And with respect to the Reliable Digit Span  
2 test, how did Mr. Brockman score?

3 A. Valid range score.

04:13:35

4 Q. Okay. With respect to the Rey 15-Item Test, is this  
5 an area where you and Dr. Denney agree or disagree?

6 A. Disagree.

7 Q. Okay. And describe that disagreement.

04:13:57

8 A. Well, Dr. Denney never -- Dr. Denney seems to suggest  
9 that -- that Fazio, et al, actually established a cutoff  
10 of invalidity for the Rey 15-Item Test, which my reading  
11 of the article, that's not the case.

04:14:15

12 Mr. Brockman -- sorry -- Dr. Denney also  
13 never mentions the -- the pattern analysis or the profile  
14 analysis, again, that the authors call the pathognomonic  
15 sign of a likely disingenuous performance, and the authors  
16 say it's better than the combination score.

04:14:33

17 So, however, when I plug in the values  
18 from the Rey 15-Item Test that Dr. Denney administered,  
19 Mr. Brockman's performance, again, falls well within the  
20 valid range.

21 Q. And when you say -- so, Dr. Denney -- he focuses on  
22 the one item, but he doesn't even mention sort of what the  
23 authors of the article say is the -- the better measure of  
24 validity?

04:14:46

25 A. Not that I have seen.

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 Q. And then I am going to show you --

2 MR. LOONAM: Can we switch over to the ELMO?

3 I'm sorry. I am keeping you on your toes there.

4 BY MR. LOONAM:

04:14:56

5 Q. What is this that we're looking at here?

6 A. That is the recognition portion of the Rey 15-Item  
7 Test.

8 Q. Okay. And what are we looking at here?

9 A. That is the free recall portion of the recognition --

04:15:08

10 of the Rey 15-Item Test.

11 Q. And do you and Dr. Denney score this portion of the  
12 test differently?

13 A. Yes, we do.

14 Q. Okay. And why is that?

04:15:17

15 A. Well, because intrusion errors -- intrusions are  
16 things that a patient draws that were not on the original  
17 15 stimuli. And, so, it appears here that, after  
18 Mr. Brockman sees the 15 stimulator taken away and then he  
19 is asked to draw it just from memory, he draws initially  
20 what appears to be the face of a clock, a partial circle  
21 and then with, it looks like, a couple of numbers. But  
22 then he crosses it out. He draws another partial circle  
23 and then a better formed circle underneath.

04:15:39

24 A circle is on the original 15-item

04:15:54

25 display. So, it's -- the clock -- if he left the clock

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

04:16:14

1 alone and said, 'Yeah, I think this was on there,' then  
2 that would be an intrusion error. But the way I look at  
3 this, he -- he crosses the clock out and then draws a  
4 circle. The circle is among the 15 items. So, there is  
5 no intrusion error there from my perspective.

6 **Q.** So, in other words, he recognized -- he demonstrated  
7 recognition that the clock wasn't among the first 15  
8 items?

9 **A.** That's the way it appears to me, yes.

04:16:32

10 MR. LOONAM: Okay. Can we switch back? It  
11 helps me keep track of where we are here.

12 BY MR. LOONAM:

04:16:46

13 **Q.** So, you scored the Rey 15-Item Test as valid. And  
14 that's -- the difference of opinion is both over Fazio and  
15 the scoring in this instance. Correct?

16 **A.** Right. Right. I scored "valid" because the pattern  
17 analysis is -- is clearly within -- within -- within the  
18 acceptable limits that the authors describe. And I also  
19 would not score what you just saw as an intrusion error.

04:17:06

20 **Q.** Yeah. And the pattern analysis, again, how did the  
21 authors describe that? As the preferred method or the  
22 superior method?

04:17:24

23 **A.** Right. So -- so, what the authors say is that there  
24 are -- are three scores that, if combined together, if  
25 they are present, then, no one in their sample, no

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 dementia patients, get all of those three items correct.  
2 So zero percent. So, that's why they call it such a --  
3 such a critical sign of disingenuous performance, because  
4 if you're testing a dementia patient and literally not one  
04:17:46 5 dementia patient that they studied ever got that score,  
6 that would certainly raise a question about the validity  
7 of the 15-item test.

8 **Q.** Okay. Then we have Dr. Denney's administration,  
9 again, of the Green MSVT. Does Mr. Brockman obtain a  
04:18:04 10 possible Genuine Memory Impairment Profile on the  
11 administration of that test?

12 **A.** Yes, he does.

13 **Q.** And on Dr. Green's Medical Symptom Validity Test,  
14 does the defendant obtain a possible Genuine Memory  
04:18:19 15 Impairment Profile on the administration of that test by  
16 Dr. Denney?

17 **A.** Yes, he does.

18 **Q.** And so is --

19 MR. LOONAM: And we can -- can we switch back?

04:18:28 20 BY MR. LOONAM:

21 **Q.** I just want to -- There was some question about this  
22 during Dr. Denney's testimony, so let's make sure we dot  
23 our I's and cross our T's here.

24 What is this?

04:18:43 25 **A.** This is the Nonverbal Medical Symptom Validity Test

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 administered by Dr. Denney.

2 **Q.** Okay. And -- and -- and what does it reflect?

3 **A.** It reflects the genuine memory -- a possible Genuine  
4 Memory Impairment Profile.

04:18:58

5 **Q.** Okay. And that was DX-63.

6 I am going to put up DX-64 now. And what  
7 does this reflect?

04:19:25

8 **A.** This is the Medical Symptom Validity Test, the  
9 advanced interpretation profile from the test administered  
10 by Dr. Denney on October 26th.

11 **Q.** Okay. And, so, how many -- how many -- over the  
12 different, you know, battery of tests, how many Green  
13 stand-alone validity tests have been administered to the  
14 defendant?

04:19:43

15 **A.** Six.

16 **Q.** Okay. And what have been the results of every single  
17 one of those tests?

18 **A.** They have all produced a possible genuine impairment  
19 memory profile.

04:19:54

20 **Q.** And can you remind the Court of the research that was  
21 conducted by Dr. Denney's paper regarding the  
22 administration of multiple Green tests and what the  
23 significance was as to the sensitivity of detecting the  
24 fakers?

04:20:11

25 **A.** Yes. So, Dr. Denney's article revealed that among

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04:20:34

1 his simulators, people faking dementia, all graduate  
2 students in psychology, that not one of the 50 was able to  
3 produce a Genuine Memory Impairment Profile across all  
4 three of the Green tests. And so, therefore, it was  
5 sensitive to -- when given all three, it was sensitive to  
6 simulation rather than producing a profile that suggested  
7 a possible genuine memory impairment.

04:20:57

8 **Q.** In other words, at least in that study, it found the  
9 fakers 100 percent of the time when three tests were  
10 administered?

11 **A.** Yes.

04:21:18

12 **Q.** Okay. And so let's now go to the -- the next boxes  
13 here. Okay? Let's understand these. Okay? You know,  
14 this is where the clinical judgment kicks in and this is  
15 where you and Dr. Denney disagree on the interpretation of  
16 the Green tests. Correct?

17 **A.** Yes.

04:21:38

18 **Q.** And Dr. Denney, if you recall, talks about comparison  
19 groups and how Mr. Brockman falls below. His scores are,  
20 you know, way below the dementia profile group or other  
21 comparison dementia groups. Do you recall that?

22 **A.** Yes.

04:21:56

23 **Q.** Okay. I am going to -- we are just going to go  
24 through an example of this, but this is Dr. Denney's  
25 supplemental report.

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1 MR. LANGSTON: Is it 2? Government 2?

2 MR. SMITH: Government 2, yes.

3 MR. LANGSTON: Yeah. So Government 2. Sorry.

4 My item is not marked here.

04:22:04

5 I'm just going to put this up for the

6 Court to look at. And this is Page 11 of Government 2.

7 BY MR. LOONAM:

8 Q. What are we looking at here?

9 A. So, this is a graph of the different subtests of the

04:22:22

10 Nonverbal Medical Symptom Validity Test, and you see

11 Mr. Brockman's scores on each of the subtests. And then

12 the other dotted lines, sort of, that you see reflects the

13 average scores of the -- of the comparison groups that are

14 listed underneath the profile.

04:22:41

15 Q. Okay. So, this is important here.

16 What -- what's the -- what's the issue

17 with this chart if you're comparing the performance of an

18 individual against the -- When you say the average, is

19 that the mean?

04:22:56

20 A. Yes. Yes.

21 Q. When you compare the performance of an individual

22 against the performance -- the mean of a group's

23 performance, what's the risk?

24 A. Oh. Well, the risk is that the mean is simply one

04:23:09

25 number. It's a measure of the average, the central

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1 tendency of the scores. It does not take into account the  
2 fluctuation or the deviation of scores within the sample  
3 or within the group.

04:23:28

4 **Q.** And, so, you know, if you have a group of three, one  
5 person scores 100, one person scores a zero, one person  
6 scores 50, you know, an average line is going to show a 50  
7 right?

8 **A.** Yes.

04:23:41

9 **Q.** So, somebody who scored a 20 was way below that  
10 average?

11 **A.** Yes.

12 **Q.** And so what -- so, what other data is critically  
13 important to being able to understand these charts?

04:23:56

14 **A.** Knowing the standard deviation of each of those  
15 scores and also even -- and equally important would be  
16 knowing the range of the scores; that is, because the  
17 standard deviation tells you the dispersion or the  
18 distribution of scores, how much scores vary from the  
19 mean.

04:24:15

20 **Q.** Uh-huh.

21 **A.** But that doesn't always capture the range. So, the  
22 range really tells you the lowest score obtained by a  
23 sample and the highest score obtained by a sample.

04:24:28

24 **Q.** In other words, the range -- if you have a group of  
25 genuine dementia patients, the range will tell you, hey, a



THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 genuine dementia patient scored at this point and then all  
2 the way through up to this point.

3 **A.** Yes.

4 **Q.** Is that accurate?

04:24:45

5 **A.** Yes. That's the range.

6 **Q.** And -- okay. And this chart doesn't show that.

7 Correct?

8 **A.** Correct.

04:24:52

9 **Q.** This chart just shows tracking an individual

10 performance against the mean of different groups.

11 Correct?

12 **A.** Yes.

13 **Q.** Now, let's talk about the groups. How are these  
14 groups selected?

04:25:05

15 **A.** Well, they can be selected by the program or they can  
16 be selected by the examiner.

17 **Q.** And are you familiar with Dr. Denney's testimony that  
18 in this instance he selected the comparison groups  
19 himself?

04:25:15

20 **A.** Actually, no, I was not aware of that.

21 **Q.** Okay. Well, let's see what we know about some of  
22 these groups.

23 Oh, by the way, when you're doing a

24 comparison, in addition to knowing the standard deviation

04:25:30

25 and the range, what other sort of information is important

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1 to know about the cohort that you're comparing on the  
2 individual performance?

04:25:47

3 **A.** Oh, well, things like age would be important. Like  
4 if you have information about how the diagnoses were made  
5 on these patient groups. So, those would be some  
6 important characteristics to know.

04:26:09

7 **Q.** Okay. I am going to -- and the data that's in here  
8 that comes out from the machine, do you know how that  
9 data, you know, comes into -- is this spit out by  
10 Dr. Green's computer program that he sells to clinicians?  
11 Is that accurate?

12 **A.** Yes.

13 **Q.** And how does that data, like, get to Dr. Green?

04:26:20

14 **A.** Some -- some data comes from published articles and  
15 studies, and some data -- some comes from -- as I  
16 understand it, the way it seems to me, as I read his  
17 manual, is that this is data that is generated by other  
18 people, by clinicians, and they sort of -- and they send  
19 it in to him with the scores of how their group of  
20 patients or their simulators performed on these measures.

04:26:40

21 **Q.** And no indication of whether that data is verified in  
22 any way?

23 **A.** The data that -- No. Right. The data that comes  
24 from a public study, you can examine that --

04:26:54

25 **Q.** Uh-huh.

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04:27:10

1 **A.** -- in more detail. But the data that just comes from  
2 someone who uses these tests and has gathered data in some  
3 way and sends it in to Dr. Green, there is no way of  
4 really knowing what the source is of that and -- and other  
5 information about it.

04:27:26

6 **Q.** Okay. I am -- for example, 33 MMC clinical dementia  
7 cases. What do we know about that group?

8 **A.** I don't know anything about that group. I don't  
9 know.

04:27:47

10 **Q.** Nothing. And, so, Dr. Denney claims he has data,  
11 puts it in there and just -- and doesn't reveal a standard  
12 deviation range or information about the cohort as a  
13 comparison group? Is that what we have to go on as far as  
14 33 MMC clinical dementia cases?

15 **A.** Essentially, yes.

16 **Q.** Okay.

17 THE COURT: Just -- may I ask a question?

04:27:58

18 But you don't know whether he took it from  
19 the program? If he took it from the program, would you be  
20 able to figure out what that group was?

21 THE WITNESS: Oh. So, that was not taken  
22 from -- from the program.

23 THE COURT: It wasn't?

24 THE WITNESS: No.

04:28:06

25 THE COURT: Okay.

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 BY MR. LOONAM:

2 Q. That wasn't. And, similarly, are you aware of -- You  
3 know, 48 sophisticated dementia simulators, you know,  
4 Armstead-Jehle and Denney. Do you know if that's taken  
5 from the program, or if Dr. Denney put in his own data  
6 there for the sophisticated dementia simulators?

7 A. I don't know.

8 Q. Okay. And is that the -- is that the group that we  
9 are referring to of -- of graduate students? Do you know?

10 A. Oh, I don't know. I would need to see the article  
11 again.

12 Q. Okay. All right.

13 THE COURT: Okay. Counsel, we are going to  
14 take a brief recess, just for the afternoon, because it's  
15 almost 5:00, and I need to get things organized since we  
16 are going to be working a little late tonight.

17 MR. LANGSTON: Yes, sir.

18 THE COURT: So, if we can take just maybe about  
19 a ten-minute break and we will get started again.

20 MR. LOONAM: Yes, sir. Thank you.

21 And, Your Honor, before we break, is there  
22 any objection if we waive Mr. Brockman's appearance for the  
23 balance of the day?

24 THE COURT: Not a problem. I expect this, to  
25 try to work a little late to see if we can get as far as we

THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 can.

2 MR. LOONAM: Yes, sir. And we are grateful for  
3 that.

4 THE COURT: Not a problem.

04:29:29 5 THE CASE MANAGER: All rise.

6 (Proceedings recessed from 4:29 p.m. to 4:54 p.m.)

7 THE CASE MANAGER: All rise.

8 THE COURT: Please be seated, everyone.

9 You may continue.

04:54:06 10 MR. LOONAM: Thank you, sir.

11 BY MR. LOONAM:

12 Q. All right. We were talking about the problems of  
13 comparing --

14 THE COURT: One second. I'm sorry.

04:54:23 15 MR. LOONAM: Yes, sir.

16 THE COURT: I'm sorry.

17 BY MR. LOONAM:

18 Q. We were talking about the problems with comparing an  
19 individual performance versus the mean of a group and how  
04:54:33 20 that can -- can be potentially misleading. Correct?

21 A. Yes.

22 Q. And so -- and how you and Dr. Denney differ in your  
23 subjective clinical judgment in determining whether Bob  
24 has a genuine memory impairment, because he qualified for  
04:55:00 25 the possible Genuine Memory Impairment Profile. Correct?

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THOMAS GUILMETTE, Ph.D. - DIRECT BY MR. LOONAM

1 **A.** Yes.

2 **Q.** And one of the things that the Green test says to  
3 look at are the comparison groups. Correct?

4 **A.** Yes.

04:55:15

5 **Q.** And you have explained that when you look at the  
6 comparison groups, understanding the standard deviation  
7 and the brain is critical. Correct?

8 **A.** Yes.

04:55:25

9 **Q.** And in conducting your analysis of the comparison  
10 groups, did you consider the range and standard deviations  
11 for dementia profile groups?

12 **A.** Yes.

13 **Q.** And what did you find in your analysis?

04:55:39

14 **A.** Well, that -- when you look at the standard  
15 deviations of the groups for which you can find the  
16 standard deviations, is that in the majority of cases  
17 Mr. Brockman's score falls within two standard deviations  
18 of the mean of the comparison groups.

04:56:01

19 **Q.** And what about did you find -- in exercising your  
20 clinical judgment, did you look at other dementia patient  
21 groups and compare them to Bob's scores?

22 **A.** Yes.

23 **Q.** And what did you find?

04:56:17

24 **A.** Well, I found a similar finding and, also, I -- I --  
25 there was some data that actually had the range of scores,

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1 so you could see in any group what's the lowest score and  
2 what's the highest score. And, so, in those cases,  
3 this -- that gives you a more specific look at in this --

04:56:36

4 First of all, what -- what the range tells  
5 you is that dementia patients produce a wide range of  
6 scores. For any given subtest among these Green tests,  
7 some dementia patients -- and, remember, so each of these  
8 scores counts as a percent, correct.

9 **Q.** Uh-huh.

04:56:51

10 **A.** And, so, some dementia patients are getting,  
11 depending upon the subtests, 30 percent correct and some  
12 dementia patients are getting 80 percent correct. So,  
13 there's -- there's significant variability among dementia  
14 patients.

04:57:06

15 But -- so -- but, in my analysis, what I  
16 found was that in the Green subtest, either the -- the  
17 comparison groups produced -- when you look at the  
18 standard deviation, Mr. Brockman's scores fell either  
19 within two standard deviations of the mean or were equal  
20 to or higher than the lowest score obtained by one of  
21 these groups.

04:57:34

22 **Q.** So, in other words, Mr. Brockman's scores were  
23 consistent with other known dementia patients who had  
24 taken this test; is that accurate?

04:57:54

25 **A.** Yes. Or I guess what I would -- consistent with --

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1 what I would say is that his -- his scores did not fall  
2 significantly below these other groups.

3 **Q.** Yeah. In no statistically significant way. Correct?

4 **A.** Right.

04:58:10

5 **Q.** Okay. Now, in addition to the comparison groups,  
6 what other information do you use in exercising your  
7 clinical judgment to determine whether Bob qualifies --  
8 you know, once he mathematically qualified for a possible  
9 Genuine Memory Impairment Profile, but what other

04:58:39

10 information do you use to assess whether or not he's  
11 malingering?

12 **A.** Well, then, I -- I would use the other information  
13 available to me, which would include the test results  
14 themselves, my observations of Mr. Brockman, the

04:58:58

15 neuroimaging, the neurodiagnostic studies, just sort of  
16 the history of his illness, the collateral information as  
17 well that came from other sources, also look at the  
18 evaluations conducted by Dr. Agronin, Dr. Wisniewski,  
19 Dr. Whitlow. So, I am trying to look at the -- at the big  
20 picture and combine that information together to arrive at  
21 a conclusion.

04:59:28

22 **Q.** Okay. So let's -- so, yeah, so lots of different  
23 pieces of information, you are sort of putting it all  
24 together like a mosaic, so it makes sense, is that

04:59:41

25 accurate?



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1 **A.** Yes.

2 **Q.** So, let's talk about the collateral sources. Did you  
3 conduct your own collateral interviews of sources in this  
4 case?

04:59:49

5 **A.** Yes, I did.

6 **Q.** Okay. And we will run through who they are, but  
7 since conducting those collateral interviews, have you  
8 learned anything that would cause you to question the  
9 reliability of one or more of the collateral interviews

05:00:06

10 you conducted?

11 **A.** Yes.

12 **Q.** Okay. So let's start with -- just give us a list of  
13 who you self interviewed?

05:00:17

14 **A.** I interviewed Mrs. Brockman twice. I interviewed  
15 Reverend Jackson. I interviewed Donna Ball, who is  
16 Mr. Brockman's personal secretary. I interviewed Robin  
17 Gilliland, who was a legal assistant at Reynolds and  
18 Reynolds. And I also interviewed his bookkeeper, whose  
19 name escapes me now.

05:00:40

20 **Q.** Okay.

21 **A.** Sorry. It's in my report.

22 **Q.** Okay. And overall what's the -- the picture painted  
23 of Mr. Brockman's current cognitive impairment through  
24 those collateral interviews?

05:00:54

25 **A.** Well, the collateral interviews as a general rule

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1 described a decline in Mr. Brockman's functioning  
2 beginning back 2017 or so, perhaps, that has continued and  
3 progressed over that time.

05:01:15

4 **Q.** Okay. And with respect to the collateral interviews  
5 you conducted yourself, which, if any, do you have reason  
6 to question the reliability of?

7 **A.** The collateral interview of Reverend Jackson.

8 **Q.** Okay. And why is that?

05:01:33

9 **A.** I understand that he was less than forthcoming with  
10 some IRS agents and so makes me wonder if he was  
11 controlling the information that he was giving them, he  
12 may have been controlling the information that he also  
13 gave to me.

05:01:47

14 **Q.** Okay. And so what does that cause you to do with  
15 respect to the information provided to you by Reverend  
16 Jackson?

17 **A.** I -- I simply can't put much stock in it.

18 **Q.** Okay. And did you consider collateral interviews  
19 conducted by others in this case?

05:02:02

20 **A.** Yes.

21 **Q.** Okay. And who?

22 **A.** Dr. Agronin interviewed Dr. Slade, interviewed Frank  
23 Gutierrez and also Tommy Barras.

05:02:21

24 **Q.** Okay. And of those interviews, is there -- is there  
25 any interview that you question the reliability of?

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1 **A.** Yes.

2 **Q.** Which one?

3 **A.** Tommy Barras.

4 **Q.** Why?

05:02:26

5 **A.** Dr. Agronin's report indicates that Tommy Barras  
6 described a decline in Mr. Brockman's functioning before  
7 he left Reynolds and Reynolds. He was having difficulty  
8 with certain decisions and other information and yet --  
9 yet his -- he testified during this hearing and during his  
10 testimony here he indicated that he saw no evidence of any  
11 kind of decline and that Mr. Brockman was perfectly intact  
12 up until the day he left Reynolds and Reynolds.

05:02:53

13 **Q.** What do you make of that?

05:03:11

14 **A.** Well, it's -- it's in contradiction to the report  
15 that Dr. Agronin describes. I don't know where the truth  
16 is in any of that, so I just have to discount that.

17 **Q.** Okay. And the balance of the collateral interviews,  
18 do they assist in exercising your clinical judgment?

19 **A.** Yes.

05:03:29

20 **Q.** Okay. In what way?

21 **A.** Well, they provide others' observations of  
22 Mr. Brockman's functioning over time, and evidence of  
23 cognitive issues while he was still at Reynolds and  
24 Reynolds as well as the progression of his decline over  
25 time.

05:03:50

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1 Q. And did you observe the testimony of Frank Gutierrez  
2 earlier today?

3 A. Yes, I did.

4 Q. And does -- did Frank -- Mr. Gutierrez's testimony  
05:04:02 5 support your conclusion?

6 A. Yes.

7 Q. Tell us how.

8 A. Well, Mr. Gutierrez, who spends 12 hours a day with  
9 Mr. Brockman, described the kind of assistance that he  
05:04:16 10 needed, the confusion that he exhibited. I had not really  
11 even a conversation with Mr. Gutierrez when I saw him in  
12 October, but during the course of my interview with  
13 Mr. Brockman, Mr. Brockman indicated that two of  
14 Mr. Gutierrez's sons also provide care for him.

05:04:36 15 So during a break I -- when I went out to  
16 get Mr. Gutierrez to help Mr. Brockman get to the  
17 bathroom, just on the way back to the conference room I  
18 mentioned to Mr. Gutierrez, 'So your two sons also work  
19 with Mr. Brockman?' And Mr. Gutierrez says, 'No, they  
05:04:51 20 don't. For some reason he thinks they do, and I have  
21 corrected him but he doesn't seem to remember.'

22 He mentioned the same thing with  
23 Dr. Denney and Dr. Dietz as well, which just all of this  
24 confirms the ongoing impairments and worsening of  
05:05:06 25 Mr. Brockman's functioning.

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1 Q. Okay. You also mentioned that -- the neuroimaging in  
2 this case. What -- you know, how did the neuroimaging fit  
3 into your exercise of your clinical judgment in assessing  
4 Mr. Brockman?

05:05:21

5 A. Well, the two MRIs, one in 2018, one in 2021,  
6 revealed some brain volume loss, but the more compelling  
7 evidence is from the two FDG PET scans and the amyloid PET  
8 scan, all of which were consistent with dementia.

9 Q. All right. Is that your expertise?

05:05:45

10 A. It is not.

11 Q. And where did you get the information from that it is  
12 consistent with dementia?

13 A. From the reports of the radiologists.

14 Q. That included whom?

05:05:53

15 A. That included the radiologist who actually read the  
16 initial report, Dr. Whitlow, and Dr. Ponisio.

17 Q. Ponisio?

18 A. Ponisio.

05:06:08

19 Q. That's the government's retained neuroradiologist who  
20 in her reports stated that the images were most consistent  
21 with early dementia?

22 MR. SMITH: Objection. That is leading.

23 THE COURT: And it's testifying.

24 MR. LOONAM: Done. Withdrawn.

05:06:30

25 BY MR. LOONAM:

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1 Q. Okay. So what is that, that mosaic, come together,  
2 and what does it say to you about Mr. Brockman's level of  
3 impairment?

05:06:41

4 A. Well, if I could also add, the -- his three episodes  
5 of delirium, is another factor that goes into my  
6 reasoning. So he's had delirium. This has been like  
7 every three months in 2021, which again, reflects to me  
8 the fragile nature of his brain function, the fragile  
9 nature of his cognition. It's associated with a step-wise  
10 decline in his performance, in his functioning. So,  
11 that's -- that that's another important consideration.

05:07:04

12 Q. Thank you. In assessing Mr. Brockman's, you know,  
13 cognitive impairment, and let's talk about domains now,  
14 can you describe what impairment Mr. Brockman has, if any,  
15 with respect to orientation?

05:07:26

16 A. He is not fully oriented. He is not fully oriented  
17 to month, to date, to year. He knows his date of birth.  
18 He doesn't know his home address. As you heard  
19 Mr. Gutierrez say, that he's often confused at home as  
20 to -- that he doesn't know that he is home. So his  
21 orientation, which was better at earlier testing with  
22 Dr. York, for example, he was essentially oriented, but  
23 is -- but is now no longer oriented.

05:07:47

24 So, his orientation reflects a level of  
25 confusion.

05:08:07

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1 Q. So, with respect to that cognitive domain, have you  
2 observed a progression that's reflected in the test data?

3 A. Yes.

4 Q. What about with respect to memory?

05:08:19

5 A. His memory is -- has always been quite poor on  
6 testing. What I have found happens more now is that his  
7 memory is -- there is more evidence of confabulation,  
8 confusion, unable to keep track of task demands for the  
9 most part. Sometimes he is able to do that, but other  
10 times, he is not.

05:08:47

11 So his memory is -- especially for recent  
12 events is really quite untrustworthy. Can't tell you  
13 oftentimes what happened when, how long ago this was, how  
14 many times he was hospitalized, when it happened, when did  
15 I see him last. All of that information gets confused.

05:09:01

16 Q. And -- and in putting together, you know, your  
17 clinical judgment, did you consider that 2019 deposition  
18 video and the September 2019 deposition transcript --

19 A. Yes.

05:09:19

20 Q. -- of Mr. Brockman's deposition?

21 A. Yes.

22 Q. All right. What do you make of that?

23 A. Well, it's a striking contrast to the testing by  
24 Dr. York and -- and on -- on face value it's hard to  
25 reconcile those two aspects of his performance.

05:09:35

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1                   Seeing the bigger picture, however, now, I  
2 believe that -- that what Mr. Brockman was exhibiting in  
3 January of 2019 and in September of 2019 were still some  
4 relatively well-preserved skills especially with regard to  
5 his long-term memory.

05:09:55

6                   He was -- as I understood it, he was  
7 describing procedures and products and policies that he  
8 had spent decades on, that he was very familiar with.  
9 These were overlearned ideas that allowed him to speak  
10 fluently and articulately on these topics. However, when  
11 he was confronted with exams and tests that he had no  
12 prior experience with, that were really new and novel to  
13 him, that's when his performance really declined.

05:10:10

14                   Also, Mr. Brockman is a very, very smart  
15 guy. He was writing computer code in the 1970s. So the  
16 way in which he may dement, so to speak, is -- he is the  
17 kind of gentleman who would likely show some  
18 well-preserved skills moving into his dementia, unlike  
19 others who -- who don't have the cognitive horsepower that  
20 he may have had, who might show a more rapid decline or a  
21 more rapid decline across multiple domains. Mr. Brockman,  
22 in my opinion, because of his innate intelligence and in  
23 the case of these depositions his intimate knowledge with  
24 the topics that they were involved with, showed some  
25 remarkably still intact cognitive functions, that in my

05:10:29

05:10:53

05:11:14



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1 opinion he could never do now. That's -- it is clearly  
2 out of his capabilities at the current time.

05:11:32

3 **Q.** That is my next question. I mean, wherever he was in  
4 2019, could Mr. Brockman deliver that deposition as he sat  
5 here today, present day?

6 **A.** Absolutely not.

7 **Q.** Sustained attention and vigilance, what impairment,  
8 if any, does Mr. Brockman exhibit in the domain of  
9 sustained attention and vigilance?

05:11:48

10 **A.** Well, he has difficulty staying focused over long  
11 periods of time. He has difficulty being able to maintain  
12 his attention. He loses attention rapidly. Part of that  
13 is, I think, due to the mental fatigue.

05:12:05

14 I would think -- I think part of that is  
15 simply the fact he is really unable to focus and keep his  
16 mind on a topic or a subject matter for -- for what -- for  
17 what we would consider normal span.

18 **Q.** Okay. What about working memory?

05:12:22

19 **A.** Working memory refers to the amount of information  
20 that a person can hold in their head at any given time,  
21 like a phone number.

05:12:37

22 Mr. Brockman does show some skills in that  
23 area. For example, his digit span forward typically falls  
24 within the average range, but his ability to manipulate  
25 those digits going backwards or in sequence falls below

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1 average. So he has some weaknesses with regard to his --  
2 his working memory.

3 Q. And what about mental processing speed and reaction  
4 time?

05:12:49

5 A. Yeah. So, Mr. Brockman in my opinion is simply slow  
6 to process information. He takes more time. Parkinson's  
7 disease, you -- it slows a person motorically. It also  
8 slows a person cognitively.

05:13:07

9 And so he is simply -- it takes him longer  
10 to think through problems, takes him longer to think about  
11 things, takes him longer to come to answers to questions  
12 that are posed to him.

05:13:23

13 Q. Well, and not only questions posed to him, what  
14 about, you know, observing witness testimony and how long  
15 it would take him to process that?

16 A. Yes, same problem. Same problem.

17 Q. What about visual spacial abilities?

05:13:40

18 A. He also demonstrates problems with copying designs,  
19 drawing designs, et cetera. These are less relevant to  
20 the issue of competence, but they do speak to simply -- to  
21 the nature of his brain function.

22 Q. What about problem solving and decisionmaking?

05:13:58

23 A. He also exhibits some difficulties there, although he  
24 did do well on a problem -- on one problem-solving measure  
25 that I administered called the Iowa Gambling Test, which

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1 was a little more structured than other problem solving  
2 tests that I gave him.

3 He has some innate, still, problem solving  
4 skills. For example, if you ask him common sense kinds of  
05:14:12 5 questions like what should you do if you find an envelope  
6 in the street that is sealed and addressed and has a new  
7 stamp. He can say, 'Put it in the mailbox.'

8 So some of those kinds of socially  
9 constructed solving problem -- problem-solving skills  
05:14:27 10 remain intact. But when confronted with a new task that  
11 he has to organize himself and think through options, he  
12 doesn't do well with that at all.

13 **Q.** All right. What is your understanding of the level  
14 of complexity of this case that is charged against  
05:14:44 15 Mr. Brockman?

16 **A.** My understanding is that it is very complicated.

17 **Q.** Can you just give us a sense for how complicated it  
18 is?

19 **A.** Well, it's, from what I understand, a 39-count  
05:14:54 20 indictment that involves failure to pay taxes, involves  
21 obstruction of justice, involves wire fraud, involves a  
22 failure to report income, the FBAR. I think that's the  
23 right issue.

24 Also issues with -- I don't understand  
05:15:27 25 this -- buying back bonds that were issued to -- lent

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1 money to buy his company.

2 So multiple layers of complexity, multiple  
3 entities involved, so that it appears to be a very complex  
4 case.

05:15:46

5 **Q.** And do you understand the time frame that's involved?

6 **A.** Decades.

7 **Q.** And does that matter in assessing Mr. Brockman's  
8 ability to meaningfully assist counsel in this case?

9 **A.** Yes.

05:16:01

10 **Q.** And -- and what about the quality of counsel, do you  
11 take into account the -- do you measure the quality of  
12 counsel in trying to determine whether a defendant is  
13 competent to stand trial?

14 **A.** No. I wouldn't know how to do that.

05:16:28

15 **Q.** Do you believe that Mr. Brockman is -- is able to  
16 meaningfully assist his counsel?

17 **A.** I do not.

18 **Q.** Could you just summarize for us why not?

19 **A.** Due to the nature of his cognitive impairments, I

05:16:49

20 believe he would have significant difficulty being able to  
21 recall past events accurately, review documents, and  
22 provide context to his attorneys.

23 I think he would have difficulty  
24 understanding the complexities of the case, the strategies  
25 of the case. He at times confabulates, meaning he

05:17:12

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1 generates information that's not accurate. He confuses --  
2 as I said, he confuses events that happened in the past,  
3 the temporal order of things.

05:17:30

4 So I think trying to get him to go back  
5 and provide some insight and awareness into events that  
6 happened years ago, or to understand the ramifications of  
7 current decisions, I don't think he's capable of doing.

05:17:50

8 **Q.** And some of the current decisions, for example, could  
9 Mr. Brockman, do you believe, you know, make a competent  
10 decision of whether or not to testify in the case on his  
11 own behalf?

12 **A.** No. I don't think so.

13 **Q.** And do you think he -- you think he could actually  
14 take the stand and testify in a coherent way?

05:17:59

15 **A.** I don't think so.

16 **Q.** Do you think Mr. Brockman has the mental stamina  
17 needed to sit through a trial?

18 **A.** No, I don't.

05:18:21

19 **Q.** And do you believe Mr. Brockman is -- is malingering  
20 his -- his -- his cognitive impairments?

21 **A.** I don't think so.

22 MR. LOONAM: One moment, Your Honor.

23 THE COURT: Yes.

05:18:41

24 MR. LOONAM: I have no further questions. Pass  
25 the witness.

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1 THE COURT: Sure. Cross-examination?

2 MR. SMITH: Yes, Your Honor, thank you. I'll  
3 give counsel a minute.

4 MR. LOONAM: Yes, thank you. Yeah, thank you.

05:19:01 5 And while I am cleaning up, Your Honor, do you have a -- a  
6 sense for how long you and your staff are able to persevere  
7 here, and whether we should have a witness in the wings,  
8 ready to go?

9 Because we are -- we are prepared to do  
05:19:17 10 that, if the parties are, and if the Court is --

11 THE COURT: How long, Mr. Smith, do you think  
12 you will be on cross-examination. I'm guessing about an  
13 hour, hour-and-a-half.

14 MR. SMITH: Hour-and-a-half maybe.

05:19:30 15 THE COURT: So I don't think that we are  
16 probably -- I mean an hour-and-a-half gets us to 7:00 which  
17 is what I -- that is what -- when we are going to be  
18 knocking off.

19 MR. LOONAM: Understood, Your Honor. Thank  
05:19:40 20 you.

21 THE COURT: So this witness should be the last  
22 witness of the day.

23 MR. LOONAM: Thank you, sir.

24 THE COURT: We will start up again tomorrow  
05:19:46 25 morning. And we could stay later, but then I run into

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1 problems. It turns out that we have got AC issues,  
2 security issues, so --

3 MR. SMITH: Understood, Judge.

4 THE COURT: -- and I didn't really think of all  
05:20:00 5 of that when I was looking at working later.

6 MR. LOONAM: Totally understood. I just wanted  
7 to make sure we were prepared for whatever.

8 THE COURT: We are good.

9 MR. LOONAM: Thank you, sir.

05:20:11 10 **CROSS-EXAMINATION**

11 BY MR. SMITH:

12 Q. Good evening.

13 A. Evening.

14 Q. Dr. Guilmette, my name is Corey Smith and I'm with  
05:20:19 15 the prosecution in this case. I have got a couple of  
16 questions I want to ask you.

17 First, though, I do want to pay you a  
18 compliment. I went through your CV, and you have quite  
19 the career. I mean, it's quite long, a lot of  
05:20:32 20 publications, a lot of presentations in a lot of very  
21 complex issues.

22 One thing that I notice that I wanted to  
23 ask you about, isn't it the case, Dr. Guilmette, that your  
24 primary specialty is in personal injury and brain injury  
05:20:48 25 analysis and cognitive testing of people with those

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1 injuries? Isn't that correct?

2 **A.** That is ---

3 **Q.** Yeah. Go ahead.

4 **A.** That's the majority of cases that I see, in a -- in a  
5 forensic context.

6 **Q.** Right. And so when I went through your CV, I mean, I  
7 counted it up, the number of injury cases, brain injury or  
8 other injury that you have done presentations on, and I  
9 counted 18. I probably missed a couple. It is probably

10 20, maybe 21.

11 But one word I did not see in your CV, and  
12 that word is "criminal." You have actually not worked on  
13 many criminal cases, have you, Dr. Guilmette?

14 **A.** Right. I have not.

15 **Q.** Have you ever testified in a criminal case?

16 **A.** Yes.

17 **Q.** How many times?

18 **A.** I believe four.

19 **Q.** And those were death penalty cases, right?

20 **A.** So one was a competence to stand trial, two were  
21 insanity cases, and one was a Daubert hearing that  
22 involved the death penalty.

23 **Q.** So, you acknowledge, though, there is a difference  
24 between a death penalty case where the issue is the IQ of  
25 the defendant, whether constitutionally they can be -- is



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1 that right?

2 **A.** No. No. That was -- the case that I testified in  
3 was -- was a penalty phase, was -- had nothing to do with  
4 IQ, was not an Atkins-type case.

05:22:20 5 **Q.** Okay. It was not an Atkins case?

6 **A.** Was not Atkins. No.

7 **Q.** So at most you have testified in two or three  
8 competency cases, is that right, where you're evaluating  
9 the competency of the defendant either to stand trial or  
10 in the death -- or in the penalty phase?

05:22:31

11 **A.** I have testified in one competency case.

12 **Q.** Okay. One competency case. Okay. And you testified  
13 on direct about secondary benefit, right?

14 **A.** Secondary gain? Yes.

05:22:46

15 **Q.** Secondary gain, secondary benefit. Secondary gain,  
16 which is when somebody that's being evaluated for  
17 competency or cognition, there's a question as to whether  
18 they're trying to get some kind of gain and fool the  
19 tester, right, that's what secondary gain is, right?

05:23:04

20 **A.** Yes.

21 **Q.** Okay. So what I want to ask you about is the  
22 difference between secondary gain in a personal injury  
23 situation versus secondary gain in a criminal case.

24 So in a personal injury-type case, the

05:23:20

25 objective of the subject, is it not, is to convince the

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1 test taker that they have some kind of energy -- injury,  
2 so they can gain something, isn't that right, like a brain  
3 injury or something?

05:23:36

4 They are looking to get something for  
5 themselves by feigning the injury that they claim they  
6 have? Is that right?

7 **A.** Yes.

05:23:48

8 **Q.** So the secondary gain is to reach out and get  
9 something, maybe money, maybe a settlement, maybe an  
10 insurance claim, something like that, right?

11 **A.** Yes.

05:24:02

12 **Q.** And that plays into their motivation to convince the  
13 test taker that they actually are injured and it's the  
14 objective of the test taker to find out are they really  
15 injured or are they malingering? Is that right?

16 **A.** Yes.

05:24:16

17 **Q.** Okay. Now, let's talk about a criminal case. Would  
18 you agree that in a criminal case the motivation is  
19 completely different? It's -- actually it's the exact  
20 opposite?

21 **A.** Yes.

22 **Q.** If the personal injury patient fails, and is actually  
23 unveiled to be a malingerer, they simply don't get their  
24 payout, right?

05:24:27

25 **A.** Yes.

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. If the criminal defendant fails and is unveiled to be  
2 a malingerer, they could go to jail, pay huge penalties  
3 and fines, so it's what they're going to lose versus what  
4 they're going to get, do you understand that?

05:24:45

5 A. Yes.

6 Q. Is that -- would you agree with that?

7 A. Yes. So what you're saying is that the -- are you  
8 talking about in a competence-to-stand-trial case?

05:24:58

9 Q. Right. Right. The motivations are completely  
10 different?

11 A. Yes.

12 Q. And your expertise is in personal injury cases?

13 A. I have an expertise in personal injury cases.

05:25:08

14 Q. So -- but you do not have an expertise really in  
15 criminal cases? You testified in one criminal case?

16 A. I testified in one competency.

17 Q. Competency. I'm sorry. Competency criminal case,  
18 you testified once?

19 A. Yes.

05:25:17

20 Q. Do you know how many times Dr. Denney has testified  
21 in criminal cases?

22 A. I don't.

23 Q. Would you be surprised to learn it is over 100?

24 A. I don't have any reaction either way.

05:25:26

25 Q. Do you have any idea how many criminal defendants

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Dr. Denney has evaluated for competency?

2 **A.** No.

3 **Q.** Would it be -- would it surprise you that he  
4 testified here last week that it is over 1,000, that he  
5 has been doing criminal cases for 22 years?

6 **A.** Uh-huh. Okay.

7 **Q.** Would that surprise you?

8 **A.** Again, I don't have any reaction to that.

9 **Q.** So, I mean, I -- I think we can judge for ourselves.

10 Dr. Denney has done over 1,000 criminal cases and you have  
11 done one?

12 MR. LOONAM: Is there a question pending?

13 THE COURT: That was the question.

14 BY MR. SMITH:

15 **Q.** That is a question. It is.

16 **A.** I'm sorry. Could you repeat the question?

17 **Q.** So would you agree Dr. Denney -- well, let me  
18 rephrase the question.

19 So a lot of this testing that we're  
20 testifying about, that Dr. Denney testified about, what  
21 you testified, some of it is mathematical, but some of it  
22 requires some judgment?

23 **A.** Yes.

24 **Q.** The judgment of the psychologist or the  
25 neuropsychologist, right?

KATHY MILLER, RMR, CRR - kathy@millers-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Yes.

2 **Q.** So you have to apply your expertise to what you are  
3 seeing in front of you and what you are observing; is that  
4 right?

05:26:31

5 **A.** Yes.

6 **Q.** So, on one hand we have Mr. Denney, who has done over  
7 1,000 criminal cases, versus your judgement on one  
8 criminal case?

9 **A.** Yes.

05:26:40

10 **Q.** Okay. Just want to make sure we're clear on that.  
11 And the other thing I want to ask you about before we  
12 start getting into the testing, is now your experience --  
13 and granted, it's a long, illustrative career, but it's  
14 basically a clinical career, isn't that right?

05:26:56

15 **A.** When you say basically a clinical--

16 **Q.** You have been working as a clinician. That is what  
17 you testified on direct?

18 **A.** Yes. Okay. Yes.

19 **Q.** You have been doing clinical work with patients  
20 coming in, right?

05:27:06

21 **A.** Yes.

22 **Q.** You haven't done much forensic work, have you?

23 **A.** Well, I do do forensic work. I mean what we just  
24 described in terms of the civil cases that I have been  
25 involved with, that's forensic work.

05:27:17

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. The ones you -- the one criminal case was forensic?

2 A. Well, the -- the personal injury cases, they're all  
3 forensic.

05:27:29

4 Q. Okay. Okay. But you're primarily a clinician; is  
5 that right?

6 A. I do more clinical work than other work.

7 Q. So what I want to ask you about is, isn't there a big  
8 difference between clinical work in the neuropsychology  
9 field and forensic work?

05:27:43

10 A. Yes.

11 Q. Two completely different; is that right?

12 A. Yes.

05:27:50

13 Q. Would you agree that in clinical work the patient  
14 comes to you and is telling you about their symptoms, they  
15 are taking their tests, and they think there is something  
16 wrong, and they want to get better?

17 A. Yes.

18 Q. So, they have -- they're motivated to actually be  
19 honest with you --

05:27:58

20 A. Yes.

21 Q. -- as the clinical psychologist, right?

22 A. Yes.

23 Q. In a forensic setting, isn't it the exact opposite?

05:28:11

24 A. In a -- in a forensic setting you do not take just  
25 the word of what the person is telling you. There can be

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 ulterior motives. You look for other confirmatory  
2 information.

3 So there is a much higher degree of  
4 skepticism in a forensic case than in a regular clinical  
05:28:23 5 case.

6 Q. Right. Right. And the way neuropsychologists  
7 differentiate between somebody who has generally got a  
8 mental decline or is mentally -- not mentally ill, but has  
9 cognitive decline and is malingering is we use these

05:28:41 10 validity tests?

11 A. Yes.

12 Q. Which you were asked about on direct?

13 A. Yes.

14 Q. So I just want to make sure that we're clear on the  
05:28:48 15 record here, so you have two kinds of tests, right, you  
16 have the cognitive test, right?

17 A. Yes.

18 Q. And then you have -- which measure or try to measure  
19 the cognitive level of the subject, and in a criminal  
05:29:02 20 case, the defendant?

21 A. Yes.

22 Q. And the way we determine whether the person is really  
23 trying to pass those tests or trying to fake it, as  
24 counsel says, is we use these other sets of tests, these  
05:29:13 25 validity tests, right?

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Yes.

2 **Q.** Okay. And the validity tests are designed to sort of  
3 weed out the fakers, right?

4 **A.** Yes.

05:29:21

5 **Q.** And they tell us how to interpret the cognitive  
6 tests, right?

7 **A.** Yes.

05:29:31

8 **Q.** So if somebody fails a number of validity tests, then  
9 you turn to the cognitive test and you say, 'Well, these  
10 are no good; they are unreliable.' Is that how that  
11 works?

12 **A.** Basically.

05:29:45

13 **Q.** Okay. So, isn't it a -- isn't it true that in the  
14 neuropsychology field, the consensus is that two failed  
15 validity tests basically tells you you got a faker?

16 If someone takes a battery of seven  
17 validity tests and they fail two of them, you're a faker?

18 **A.** Well --

19 **Q.** Isn't that the consensus in the field?

05:29:56

20 **A.** That is generally the consensus, yes.

21 **Q.** Okay. So now I want to ask you a little bit about  
22 some of the testing. Counsel showed you -- do you still  
23 have Exhibit 66? Do you still have that up there?

24 **A.** I can see it now.

05:30:18

25 **Q.** Oh, okay. I want you to have --



THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 MR. SMITH: Can I approach, Your Honor?

2 THE COURT: Yes.

3 MR. SMITH: Do you have another copy of this  
4 for him?

05:30:24 5 MR. LOONAM: I just have the one you gave me.

6 MR. SMITH: Did you give him one when he was  
7 testifying?

8 MR. LOONAM: No. We didn't show it.

9 MR. SMITH: We will just use the --

05:30:32 10 THE COURT: You want us to make a quick copy?

11 MR. SMITH: No, that's okay, Your Honor. I  
12 have just got a few questions about it.

13 BY MR. SMITH:

14 Q. So if I understand what you said on direct, this is  
05:30:40 15 the article that you said that you rely on in saying that  
16 Dr. Denney's scoring of the Victoria Symptom Validity Test  
17 was incorrect; is that right?

18 A. Well, actually it was from his -- from the manual --

19 Q. Okay.

05:30:55 20 A. -- that he -- that he interpreted a chance range  
21 score, and made it a below chance range score.

22 Q. So what your -- let's see if I understand what you're  
23 saying. So on this test, Dr. Denney scored Mr. Brockman  
24 at an 8, 8 out of 24 of the hard tests, right?

05:31:15 25 A. Yes.

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. And the manual and this article says, well, no,  
2 that's not below chance, it's actually -- it's -- 7 is  
3 what you need, right? You need a 7?

4 A. Yes.

05:31:26

5 Q. And not to get too deep into the statistics here, but  
6 basically what they're saying is if you're in the  
7 5 percent range, you're malingering; if you are above  
8 5 percent, you're in the valid range?

9 A. Yes.

05:31:38

10 Q. Is that right?

11 A. Yes.

12 Q. That's what this article says?

13 A. Yes.

14 Q. So, do you know the date of this article?

05:31:48

15 A. 2006.

16 Q. Yes. So this article is in 2006 written by some, I  
17 am sure, very esteemed professors: David Loring, Glen  
18 Larrabee, Gregory Lee, and Kim Meeter. Do you know any of  
19 those gentlemen and, I guess, one woman?

05:32:05

20 A. I don't know them personally.

21 Q. All right. But you have heard of who Dr. Larrabee  
22 is, right?

23 A. Yes.

24 Q. He is well-known in the field?

05:32:12

25 A. Yes.

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. Are you familiar with an article that Dr. Larrabee  
2 wrote in 2014 --

3 A. I don't know --

4 Q. -- on the same topic?

05:32:23

5 A. -- that I reviewed the article.

6 Q. Let me hand you what's already in evidence as Exhibit  
7 123.

8 MR. SMITH: May I approach, Your Honor?

9 THE COURT: You may approach.

05:32:30

10 BY MR. SMITH:

11 Q. Are you familiar with this article, Dr. Guilmette,  
12 written by Laurence Binder, Glen Larrabee, and Scott  
13 Millis?

14 A. Yes, I have seen this article before.

05:32:39

15 MR. SMITH: It's Exhibit 122. It is already in  
16 evidence. Do you need a copy?

17 MR. LOONAM: If you have one. If you don't,  
18 that's fine.

19 BY MR. SMITH:

05:32:52

20 Q. And this article is written in 2014, correct?

21 A. Yes.

22 Q. And in the abstract, I don't know if I can --  
23 whoops, wrong way. 123. I'm sorry. It is. I heard  
24 that. It's 123. I got my numbers backwards. 123.

05:33:07

25 Government's Exhibit 123. Do you see

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 where I put it on the screen there? And what Dr. Larrabee  
2 says in --

3 **A.** Excuse me, can you shrink it? It's the --

4 THE COURT: The monitor is a little off.

05:33:21

5 BY MR. SMITH:

6 **Q.** Is that better?

7 **A.** No. Shrink -- can you shrink it? There we go.

8 **Q.** How is that?

9 **A.** That's better.

05:33:26

10 **Q.** You have a copy there of the abstract.

11 **A.** That's true, I do.

12 **Q.** And what it says in that abstract, what this  
13 article -- at least in the abstract -- we will go to the  
14 body of the article.

05:33:39

15 What they're saying is that that .5, .05,  
16 5 percent cutoff for invalid is too low?

17 **A.** Uh-huh.

18 **Q.** That actually should be .2, 20 percent. So if you  
19 score on the test at 20 percent -- or, I'm sorry, below 20  
20 percent, you're a malingerer, isn't that what that says?

05:33:56

21 **A.** Yes.

22 **Q.** So, turn to page four, Dr. Guilmette.

23 **A.** Okay.

24 **Q.** And, again, can you see that on the screen? I know  
25 it's a little bit off. You have it there?

05:34:23

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Right.

2 **Q.** That's the paragraph I want to draw your attention  
3 to. It says, "Therefore, we recommend..."

4 **A.** Yes.

05:34:31

5 **Q.** So, Dr. Larrabee in 2006 said one thing, but then ten  
6 years -- you know, eight years later, he changed his  
7 results and said -- changed his analysis and said, a  
8 P-level -- that's the probability we're talking about,  
9 you're in the tail end there -- of 20 percent is

05:34:53

10 acceptable for a failed malingering -- to score it as  
11 malingering, a failed validity test; isn't that what he  
12 says?

13 **A.** Yes. That's what the article says.

05:35:06

14 **Q.** So that's different than what -- the article that  
15 counsel showed you on direct?

16 **A.** Yes.

05:35:21

17 **Q.** And that's how Dr. Denney scored the Victoria Symptom  
18 Validity Test, isn't it? The 8 is in the 20 percent,  
19 Dr. Denney's score of 8 for Mr. Brockman is in the bottom  
20 20 percent?

21 **A.** Yes. Yes.

22 **Q.** So that's a fake?

05:35:35

23 **A.** Well, however, the most recent consensus conference  
24 statement on the neuropsychological assessments of effort,  
25 malingering and response bias that I mentioned earlier in

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 my direct testimony, published just this Spring from the  
2 American Academy of Clinical Psychology did not report  
3 this. There is no consensus in the field about what the  
4 cutoff should be with regard to probability levels.

05:35:49

5 **Q.** Right. Right. And we are going to get to that paper  
6 in a minute. But it just says there is no consensus. But  
7 Dr. Larrabee indicates in his recent article, relatively  
8 recent from 2006, that that's his suggestion, that is his  
9 recommendation that that score below 5 percent, is the --

05:36:10

10 all the malingerers are below, way in the bottom at  
11 5 percent, that is incorrect. If you are in the 20  
12 percent you should score it as a fail?

13 THE COURT: I think you said 2006. I think you  
14 meant 2014.

05:36:21

15 BY MR. SMITH:

16 **Q.** This article is 20 -- he said that in 2006. But now  
17 he is saying in 2014 that that is too low, that that has  
18 to be at 20 percent or less. Dr. Larrabee is saying that  
19 now in 2014, right?

05:36:34

20 **A.** Yes.

21 **Q.** And the 2020 -- the 2021 American Academy of  
22 Neuropsychologists consensus paper does not contradict  
23 that, does it?

24 **A.** It doesn't support it either.

05:36:46

25 **Q.** That wasn't my question. I am -- I know you have

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 said it doesn't support it, but it doesn't contradict it  
2 either?

3 **A.** I would argue that it does because otherwise it would  
4 state that 20 percent probability of chance performance  
05:37:00 5 should be the cutoff and it doesn't say that.

6 **Q.** So because it doesn't affirmatively say that, then  
7 that means it says -- that Dr. Larrabee is wrong?

8 **A.** It says that there is not a consensus in the field  
9 that would support Dr. Larrabee's contention.

05:37:14 10 **Q.** Okay. So it's a matter of judgment? How to score  
11 this test is a matter of judgment, there is not a  
12 consensus, right?

13 **A.** There is not a consensus.

14 **Q.** So Dr. Larrabee said one thing in 2006 and that's --  
05:37:28 15 that's what you chose to follow?

16 You said, Well, Dr. Larrabee says in 2006,  
17 Dr. Denney's scoring of the Victoria Symptom  
18 Medical Validity Test -- I am -- it is hard for me to get  
19 these terms out, the VSMT -- Dr. Larrabee said in 2006  
05:37:45 20 that that's a fail, so you chose that analysis to apply to  
21 Dr. Denney and said Dr. Denney is wrong, it's a fail, but  
22 in 2014 Dr. Larrabee said the exact opposite, you chose  
23 not to choose that analysis?

24 **A.** I was still going by the -- by what the manual  
05:38:01 25 suggests.

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. Which is contradicted by Dr. Larrabee, who wrote the  
2 first article?

3 A. But that still does not mean -- there is still not a  
4 consensus. There is still not a consensus. If the -- if  
05:38:13 5 the consensus conference said, you know what, Larrabee is  
6 right, you know, we will just make 20 percent, you know,  
7 that's it, we're good with that, but they didn't say that.

8 Q. I get -- I understand that. Let me ask this a  
9 different way.

05:38:23 10 I understand there is not a consensus.  
11 That is not what I am asking you.

12 A. Okay.

13 Q. Dr. Guilmette, what I am asking you is, it's not a  
14 consensus and there is difference -- there is different  
05:38:34 15 opinions -- there is one opinion in 2006, and there is one  
16 opinion in 2014; you chose the opinion in 2006, that  
17 allowed you to conclude that Dr. Denney improperly scored  
18 that test. Isn't that what happened?

19 A. I think Dr. Denney was incorrect in using that  
05:38:49 20 cutoff.

21 Q. That is your opinion --

22 A. Yes.

23 Q. -- based on the 2006 article of Dr. Larrabee?

24 A. Based on the -- on the fact that in the field, .05 is  
05:38:58 25 generally the standard, and that was not contradicted by

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THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 the consensus conference.

2 **Q.** All right. We will move on.

3 **A.** Okay.

4 **Q.** So the other thing you said about Dr. Denney on

05:39:08

5 direct, and one of his tests, the Green NM -- NV-MSVT

6 test, and this is Government's Exhibit 2, counsel showed

7 you this chart here. Is that on your screen?

8 **A.** Yes.

9 **Q.** It's from Dr. Denney's October report. Do you

05:39:25

10 remember that?

11 **A.** Yes.

12 **Q.** And this was Dr. Denney's -- excuse me -- this was

13 Dr. Denney's graphing of Mr. Brockman's scores, because

14 this test has a lot of subtests, right?

05:39:40

15 **A.** Yes.

16 **Q.** They go from easy to hard?

17 **A.** Right.

18 **Q.** So what Dr. Denney did is he scored those and he put

19 them on this graph. And so we have the IR, the DR, the

05:39:56

20 CNS, and the DRA, those are all easy tests, right?

21 **A.** Yes.

22 **Q.** And then you got the harder tests at the end?

23 **A.** Yes.

24 **Q.** Right. And so what Dr. Denney did is he plotted

05:40:07

25 those scores and he said, 'Well, you know, it's sort of

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

05:40:26

1 inconsistent with what we generally see, these dotted  
2 lines going across. For genuine demented patients, there  
3 is more of a smooth curve, but Mr. Brockman is not in a  
4 smooth curve, so it's not a typical profile.' That's what  
5 Dr. Denney said, right?

6 **A.** Yes.

7 **Q.** Okay. And counsel asked you about these groups down  
8 here that Dr. Denney compared Mr. Brockman's scores to.  
9 You see that?

05:40:41

10 **A.** Yes.

11 **Q.** The dotted lines. And that's what Dr. Denney is  
12 comparing Mr. Brockman's scores to are those dotted lines  
13 of these other people, right?

14 **A.** Yes.

05:40:50

15 **Q.** Now, counsel asked you where those groups came from  
16 and he asked you whether or not Dr. Denney just picked  
17 those groups and just made it all up.

18 Remember him asking you that?

19 **A.** Well, I --

05:41:00

20 MR. LOONAM: Objection, misstates the question.

21 MR. SMITH: I'll rephrase it, Your Honor.

22 BY MR. SMITH:

05:41:10

23 **Q.** Let me just get right to it. In fact, of all these  
24 groups, these dotted lines that Mr. Brockman's scores are  
25 being compared to, Dr. Denney only picked one of those

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 groups; isn't that true?

2 **A.** I don't know how many he picked.

3 **Q.** Well, how many of these have his name on them?

4 **A.** One.

05:41:21

5 **Q.** And these other groups; mixed dementia, where my pen  
6 is pointed, and -- Dr. Cohen, and there is another one  
7 down here. Doesn't the -- doesn't the exam give you  
8 groups to compare scores to?

9 **A.** Yes.

05:41:39

10 **Q.** And isn't that what this is?

11 **A.** Yes.

12 **Q.** So, Dr. Denney did not pick these groups? He didn't  
13 pick all of them?

14 **A.** I don't know how many he picked.

05:41:49

15 **Q.** Well, he didn't pick all of them, did he?

16 **A.** I don't know. So, are -- are you saying that because  
17 it says Dr. Cohen on the -- on the second line, that that  
18 meant that -- that Dr. Cohen chose? I am not quite sure.

19 There is no way of knowing just looking at  
05:42:07 20 this which groups Dr. Denney actually went in and chose  
21 himself, versus which groups were chosen by the program.

22 **Q.** Okay. Well, that's a good point. So let me ask you  
23 about that. When you say go in and choose the groups,  
24 these are groups of patients that the test taker can  
05:42:24 25 choose from to compare his patient's score to, right?

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Yes. Yes. There is that option.

2 **Q.** Right. So the test taker goes into the program and  
3 the program has got all these test scores of different  
4 groups of people and they say let's compare to, let's see,  
05:42:41 5 mixed dementia group who passed NN -- NV-MSVT Criteria A.

6 And these groups of patients, these are  
7 patients, and these analyses and scores of these patients,  
8 they're in the program, right?

9 **A.** Yes.

05:42:55 10 **Q.** Dr. Denney didn't go out on the street and pick up  
11 some people and test them and put them in the chart,  
12 right?

13 **A.** Not those.

14 **Q.** That's what I am asking you. These are test results  
05:43:03 15 that are built into the program, and then Dr. Denney went  
16 in and looked for, apparently, in this case, mixed  
17 dementia group folks.

18 And if you could turn to the next page.

19 **A.** I don't have the next page.

05:43:25 20 **Q.** Oh, I'm sorry, I forgot you didn't have it up there.  
21 Let me put this up here.

22 This is the other test and in Dr. Denney's  
23 report, the Green's MSVT, and, again, we have these groups  
24 here that he is comparing to, and in this case we got mean  
05:43:40 25 age 73, mean age 76.

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1 So the program gives you the option of who  
2 to compare your patient's test scores to, right?

3 **A.** Yes.

4 **Q.** Dr. Denney didn't test these people?

05:43:54

5 **A.** Not these people.

6 **Q.** And he didn't pick them up out of the street, right?

7 **A.** No.

8 **Q.** They are not in his practice in Missouri, right?

9 **A.** Not these people, no.

05:44:02

10 **Q.** They're in the exam. I'm sorry. They're in the  
11 program, right?

12 **A.** Yes.

13 **Q.** Then you click the box of which ones you want that  
14 look like your patient?

05:44:09

15 **A.** Yes.

16 **Q.** And Dr. Denney picked people who were 76, 76 and with  
17 dementia?

18 **A.** Yes.

19 **Q.** Okay. Which is -- wouldn't you agree that that's a  
20 suitable comparison to compare to Mr. Brockman?

05:44:19

21 **A.** Yes.

22 **Q.** Okay. All right. So, now, let's talk about your  
23 tests. So you mentioned it on direct, the Iowa Gambling  
24 Test.

05:44:38

25 **A.** Yes.

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. Do you remember talking about that?

2 A. Yes.

3 Q. Can you just explain for the Court real quickly what  
4 is the Iowa -- what does the patient have to do when you  
05:44:45 5 administer the Iowa Gambling Test?

6 A. So in the Iowa Gambling Test a patient is shown  
7 essentially four decks of cards, and the individual  
8 chooses a deck, or chooses a card from the decks, and the  
9 card that they choose will either reward them money, or  
05:45:06 10 will take money away from them.

11 And so what the individual has to do is to  
12 try to max -- and the decks have various values in terms  
13 of how much -- which decks are more advantageous to choose  
14 versus which decks you will lose more money from.

05:45:24 15 And so the individual has to -- they  
16 choose a deck, a card, and then they have to try to figure  
17 out based upon how much money they make, or how much money  
18 they lose from any given card in each deck, which decks  
19 are more advantageous to continue to play from.

05:45:44 20 Q. And isn't it true, Dr. Guilmette, that the idea of  
21 the test is to test the patient's decisionmaking skills,  
22 and risk/reward, and almost an executive function?

23 A. Yes. Excuse me. It's -- it's very much -- yes, a  
24 risk/reward kind of balance is what the patient is trying  
05:46:12 25 to do.

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. And up on the screen, do you see what I have got up  
2 there?

3 A. Yes.

4 Q. Is that your test scores on Mr. Brockman in the Iowa  
5 Gambling Test?

6 A. Yes.

7 Q. From your July exam -- so the record is clear,  
8 from your July exam, you administered the Iowa Gambling  
9 Test?

10 A. Yes.

11 Q. Which is not a validity test, right?

12 A. Correct.

13 Q. It's a competency test?

14 A. Competency?

15 Q. Cognitive test. I'm sorry, I misspoke. Cognitive  
16 test?

17 A. Yes.

18 Q. And you administer this score, and Mr. Brockman  
19 passed the test, didn't he?

20 A. He passed. Yes, he did, basically.

21 Q. And he got a score of -- of 50 -- of -- I'm sorry,  
22 49, that was his total score, right?

23 A. Yes.

24 Q. And each one of these net one, two, three, four,  
25 five -- these are the different times that he goes through

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 the test? Five times?

2 **A.** Yes.

3 **Q.** 20 choices, five times, see how he does.

4 And on all of these tests he scored above

05:47:15 5 44, except the last one he had a raw score -2 and he  
6 scored a 43?

7 **A.** Correct.

8 **Q.** Which is still in the unimpaired range. Right?

9 **A.** Yes.

05:47:24 10 **Q.** So, just to be clear, let's look at what the manual  
11 says. Are you familiar with this?

12 **A.** Yes.

13 **Q.** So, for the record, it's the Iowa Gambling Test  
14 manual. What I want to show you, Dr. Guilmette, is what  
05:47:42 15 the manual says about scoring, when talking about manuals  
16 and tests and how we are supposed to score these tests. I  
17 have highlighted the section I want you to read.

18 MR. LOONAM: Your Honor, while the witness is  
19 reading, I note we don't have a copy of this.

05:47:55 20 MR. SMITH: Yeah. I only have one. I only  
21 have one copy. We can get you a copy. It's on the screen.

22 THE COURT: Yeah. If anybody wants us to make  
23 copies to speed things up, I can have someone do that.

24 BY MR. SMITH:

05:48:10 25 **Q.** So, the part of the score -- the manual that tells



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1 you how to score or how to interpret the scores, it says  
2 that "T scores higher than 44 at a decisionmaking level or  
3 higher (the top range of neurology-impaired patients)  
4 those patients should be considered unimpaired."

05:48:29

5 **A.** Yes.

6 **Q.** And, so, Mr. Brockman's score was well above 44.  
7 Right? He scored a 49?

8 **A.** Yes.

05:48:44

9 **Q.** You didn't put that in your report, though, did you,  
10 Dr. Guilmette?

11 **A.** I didn't put that quote, no.

12 **Q.** No. No. You didn't put his score of 49 or that he  
13 tested unimpaired in the Iowa Gambling Test. You did not  
14 put that in your report, did you?

05:48:54

15 **A.** I thought I put all of these scores in my report.

16 **Q.** Well, let's look at your report. So, this is Defense  
17 Exhibit 19, Page 52. Can you see that?

18 **A.** Yes.

19 **Q.** Iowa Gambling Test?

05:49:15

20 **A.** Yes.

21 **Q.** You want to show me where in your report you put in  
22 that Mr. Brockman scored a 49, which puts him in the  
23 unimpaired range?

05:49:30

24 **A.** I don't -- Do you have the actual raw scores or  
25 the -- There should be a table of scores that I think that

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 I included.

2 Q. That's what I just showed you. This is the table,  
3 sir.

4 A. No. No. No. I'm sorry. The table in my report.

05:49:46 5 Q. You mean this table?

6 A. Yes.

7 Q. And you put the 49-T. Right?

8 A. Yes.

05:49:53 9 Q. Did you put in your report that that means he's  
10 unimpaired?

11 A. No.

12 Q. So, you just put the score and you didn't interpret  
13 it?

05:50:03 14 A. No. I did interpret it. I mean, I said that he --  
15 that his performance -- I don't remember the exact words  
16 that I said, but I acknowledged his performance on this  
17 test.

18 Q. But you didn't say he's -- this test indicates he is  
19 unimpaired? That's not in the report?

05:50:18 20 A. Right. I did not say that.

21 Q. As a matter of fact, what you did, though, is you  
22 said that you -- you focused on the last test, where he  
23 got a -2, of the five subtests of 20 cards -- what you did  
24 is you simply focused on the one part of the test where he  
05:50:36 25 came out with a -2. Isn't that right?

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THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** I don't think so. I also say that he -- that he was  
2 able to generate -- his overall performance reflected that  
3 he generally made advantageous choices to increase his  
4 winnings and avoid losses. So, I am describing his  
5 performance.

05:50:54

6 **Q.** What I have highlighted here or what you  
7 highlighted -- didn't you say in this report, "However, in  
8 the last trial of 20 cards, net five" -- that's the last  
9 trial -- "his decisionmaking became disadvantaged, perhaps  
10 secondary to fatigue. He began to choose cards from the  
11 decks," so on and so forth, and then you go on to say that  
12 he took 25 minutes to complete the test. "He likely  
13 performed more proficiently on the test with 20 questions  
14 because it was more structured."

05:51:06

15 Nowhere in there, Dr. Guilmette, do you  
16 say the overall test score indicates he's unimpaired;  
17 isn't that correct?

05:51:21

18 **A.** Yes. That's correct.

19 **Q.** And, instead, what you did, you simply focused on the  
20 one subtest where he underperformed. Isn't that what you  
21 did?

05:51:32

22 **A.** I -- I am describing the test as I saw it.

23 **Q.** Okay. So, now, you were also asked some questions on  
24 direct about coaching.

05:51:52

25 **A.** Yes.

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. That's a broad term. Wouldn't you agree that in the  
2 field of neuropsychology that it's also improper -- or the  
3 literature suggests that it's improper to prompt the  
4 patients or suggest answers or sort of edge them a little  
05:52:17 5 bit in a certain direction like, 'Well, this is a real  
6 easy test. You should do good on it.' That's not really  
7 coaching, but it's sort of like edging him in a certain  
8 direction. Would you agree that that's not appropriate in  
9 the field of neuropsychology?

05:52:30 10 A. As you described it, I would agree with that.

11 Q. So, just so we're clear: Are you familiar with Grant  
12 Iverson?

13 A. Yes.

14 Q. And who is Grant Iverson?

05:52:46 15 A. He is a well-known neuropsychologist.

16 Q. And are you --

17 MR. SMITH: Yeah. We are going to mark this  
18 article for identification. Where are we? 161? "Ethical  
19 Issues Associated with the Assessment of Exaggeration."

05:53:16 20 May I approach the witness and give him a  
21 copy?

22 THE COURT: You may.

23 BY MR. SMITH:

24 Q. I just want to draw your attention, Dr. Guilmette, to  
05:53:22 25 one thing that Mr. Iverson says in his article about

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1 "prompting," which I think is probably a more accurate  
2 term than "coaching," don't you think?

3 **A.** I don't know what you're referring to exactly.

4 **Q.** Prompting -- prompting patients on how to take tests.

05:53:57

5 Professor Iverson says: "Warning or  
6 prompting patients immediately before taking the effort  
7 test, it is appropriate to warn patients that methods for  
8 detecting exaggeration and poor effort are part of the  
9 evaluation process. It is not appropriate to warn or

05:54:11

10 prompt the patient immediately before the test is  
11 administered." Isn't that what he says?

12 **A.** Yes.

13 **Q.** And that is generally accepted in your field, is it  
14 not --

05:54:19

15 **A.** Yes.

16 **Q.** -- not to prompt patients?

17 Let's look at some of your tests. I think  
18 you -- you talked about this. Well, actually -- wait a  
19 minute. Before we get to the tests:

05:54:43

20 You have already mentioned the American  
21 Academy of Clinical Neuropsychology 2021 Consensus  
22 Statement. And I have got some copies for counsel. I  
23 want to ask you something that's in that consensus  
24 statement. Is that the one that you have been talking  
05:54:59 25 about?

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Yes.

2 **Q.** Yeah. Okay.

3 MR. SMITH: And if I may approach?

4 THE COURT: You may approach.

05:55:09 5 MR. SMITH: This will be easier probably than  
6 the monitor.

7 THE WITNESS: Oh, you gave me --

8 MR. SMITH: Yeah. It's two because it's so  
9 thick. And we are marking this for identification as 162.  
05:55:21 10 It's the 2021 American Academy of Clinical Neuropsychology  
11 2021 Statement on Validity Assessment.

12 BY MR. SMITH:

13 **Q.** And, again, I just wanted to draw your attention to  
14 one part of this. It's Page 1069. I may take this off.  
05:55:55 15 It will be easier to put it on the screen.

16 Isn't it the consensus that practices --  
17 what the consensus says is that you are supposed to follow  
18 the rule book in how to give the test and not depart from  
19 the rule book and not -- and, if you do, that can result  
05:56:28 20 in more sophisticated forms of feigning. Isn't that what  
21 the consensus said? Do you see that paragraph?

22 **A.** Yes.

23 **Q.** So, both the American Academy of Clinical  
24 Neuropsychologists Consensus Statement and Professor  
05:56:53 25 Iverson -- isn't it true what they're saying is you've got

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1 to be careful when you're giving a test of sort of  
2 prompting the or -- the patients, prompting the patients,  
3 or sort of suggesting how they should handle the test?  
4 Isn't that what they're saying?

05:57:07

5 **A.** Yes.

6 **Q.** Okay. So, let's look at a couple of your tests from  
7 your July examination of Mr. Brockman.

05:57:20

8 The first test, the Rey-15 test -- and if  
9 we could just switch for a second to the -- This is  
10 Exhibit 124 that was introduced when Dr. Denney was  
11 testifying. This is the blank test sheet of the Rey-15  
12 test.

13 This is the Rey-15 test. Right,  
14 Dr. Guilmette?

05:58:11

15 **A.** Yes.

16 **Q.** And so -- Just if I could have a second to get to the  
17 page of your report.

18 This is -- you administered this test in  
19 July, when you examined Mr. Brockman. Right?

05:58:22

20 **A.** Yes.

21 **Q.** And what the test-taker does is you -- you show this  
22 to the patient, and then you take it away and you ask them  
23 to draw that?

24 **A.** Yes.

05:58:33

25 **Q.** And then there is another part where they then are

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 given a sheet with the symbols and some other symbols.

2 That's the recognition part, and they are supposed to  
3 circle as many as they can?

4 **A.** Yes.

05:58:46

5 **Q.** And from your test data, this is the recognition  
6 portion. It doesn't all fit. We can maybe back it off.

7 Do you recognize this? I mean, that hand, that's you?

8 **A.** Yes.

9 **Q.** And this is the recognition portion?

05:59:00

10 **A.** Yes.

11 **Q.** So, as you testified in direct, though, what you did  
12 was -- he didn't do really well on the test. He drew that  
13 little -- that little symbol, and then you readministered  
14 the test a second time?

05:59:16

15 **A.** I don't follow you. He -- he drew what little  
16 symbol?

17 **Q.** All right. So, let me ask it a different way.

18 When you administered this test to

19 Mr. Brockman in July, he didn't do well on the test, and

05:59:27

20 then you showed him the test again and you let him have a  
21 second chance. Isn't that what you did?

22 **A.** He passed the test. I just gave it to him again to  
23 test the limits, to see if that would make any difference.  
24 But his first performance was valid.

05:59:49

25 **Q.** Let's look at your -- do you have your report



THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 there --

2 **A.** Yes.

3 **Q.** -- which is -- I think this is 19, Defendant's  
4 Exhibit 19. Let's look at what you put in the report.

06:00:06

5 Oh, this is what I wanted to show you.

6 Before I do that:

7 You gave it to him twice. Here is Trial 1  
8 where he is supposed to draw the symbols that -- Just so  
9 we will be clear: These are the symbols?

06:00:23

10 **A.** Yes.

11 **Q.** You take it away. You say, 'Okay. Draw what you  
12 saw'?

13 **A.** Yes.

14 **Q.** And that's what he drew?

06:00:28

15 **A.** As I said, he initially wrote "ABC," and then erased  
16 it and drew those figures, and then drew -- and then wrote  
17 "123," "123," "123."

18 **Q.** And, in your mind, that's a pass?

19 **A.** It is a pass. That, in conjunction with the  
20 recognition test or with the recognition work, is a pass.

06:00:43

21 **Q.** And then you gave him the test again, Trial 2?

22 **A.** Yes.

23 **Q.** And he said, "I'm at a loss"?

24 **A.** Right.

06:00:52

25 **Q.** And that's a pass, too, I guess?

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1 **A.** I didn't -- because I had -- he had already had it  
2 once. That was breaking standardization, to give it to  
3 him right after. So, I did that looking at more  
4 qualitative information. You know, if I gave him more  
06:01:07 5 time, would that make any difference? And, in fact, it  
6 obviously did not. But he passed it the first time  
7 around.

8 **Q.** Well, isn't there in the manual a calculation that  
9 you're supposed to do to determine whether it's a pass or  
06:01:28 10 a fail? The true positives minus the false positives  
11 minus the inclusions?

12 **A.** So, as we had -- as I had testified earlier, the  
13 article that I relied on to determine the various -- There  
14 are two scores recommended for individuals who are over  
06:01:47 15 the age of 60 and with possible dementia. There is a  
16 combination score, and then there is what the authors  
17 describe -- the Fazio, et al -- the authors describe as,  
18 again, the pathognomonic sign of a disingenuous  
19 performance, and that is a series -- there are three  
06:02:07 20 decisions or three characteristics of a person's profile.

21 Mr. Brockman -- and so -- and, so,  
22 Mr. Brockman's performance is within the valid range based  
23 upon those recommendations by Fazio, et al.

24 **Q.** We are going to get to Fazio's article in a second,  
06:02:29 25 but what I am asking you about is: On this test that's

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

06:02:45

1 now on the screen, when you administer the test, aren't  
2 you supposed to do a calculation to determine if it's a  
3 pass or a fail, the true positives, minus the false  
4 positives, minus the inclusion -- the inclusions, the  
5 stray marks?

6 **A.** Can I look at my notes?

7 **Q.** Yeah.

8 **A.** Yes. So, the -- so, the -- the combination score --  
9 which is, I think, what you're referring to --

06:03:16

10 **Q.** That's right.

11 **A.** -- yes -- is recognition true positives, minus  
12 recognition false positive, minus intrusions. So, that's  
13 5 minus 3 minus 1.

14 **Q.** Right.

06:03:26

15 **A.** So, with a score of 1.

16 **Q.** Right.

17 **A.** Okay. Again, so that is -- a score of one or fewer  
18 was found in 8.7 percent of Fazio's sample. Fazio --  
19 he -- I know Dr. Denney is claiming that 2 is the cutoff.

06:03:43

20 The article never states that 2 is the cutoff.

21 And then there is the pattern analysis.

22 The pattern analysis is a recall score less than 3, a true  
23 positive score less than 3 or a false positive score

24 greater than 5. Now, Mr. Brockman doesn't meet any of

06:04:03

25 those criteria. This is the -- what I just described in

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 terms of the pattern analysis is a -- is a perfectly valid  
2 pattern of scores.

3 Q. All right. Well, let's just walk through that a  
4 little bit.

06:04:15

5 So, it's 5 minus 3, which is 2, minus the  
6 inclusions --

7 A. Intrusions.

8 Q. -- I'm sorry -- intrusions, which are the stray  
9 marks. So, do you count that as an intrusion, that mark?

06:04:29

10 A. The mark?

11 Q. This mark here.

12 A. Yes.

13 Q. So, that's a 1?

14 A. Yes.

06:04:34

15 Q. So, it's 5 minus 3 minus 1, which is a 1. So, he has  
16 got a score of 1?

17 A. Yes.

18 Q. And then what you are doing is not -- you're  
19 comparing that to patients with dementia?

06:04:45

20 A. Yes.

21 Q. So, in scoring Mr. Brockman on this validity test,  
22 you are scoring him against patients with dementia?

23 A. Yes.

24 Q. So, isn't the point of the testing to determine if he  
25 has dementia?

06:04:57

KATHY MILLER, RMR, CRR - kathy@millers-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** That's not the point of this test.

2 **Q.** No. No. No. The overall test battery. The reason  
3 you were conducting any tests was to determine if  
4 Mr. Brockman had dementia?

06:05:07

5 **A.** Yes.

6 **Q.** So, you're presupposing dementia to score the test to  
7 see if he has dementia?

06:05:20

8 **A.** I am scoring this in a way that I think is most  
9 appropriate, given Mr. Brockman's history, performance on  
10 other measures, my observations, neuroimaging data,  
11 et cetera.

12 **Q.** Go ahead. I'm sorry.

13 **A.** No. That's all.

14 **Q.** That's what I wanted to get to.

06:05:31

15 So, you're looking at the other  
16 information you were given about Mr. Brockman, making a  
17 judgment in your professional opinion that he has  
18 dementia, and then scoring the tests as if he has  
19 dementia?

06:05:45

20 **A.** Let me actually -- if I may.

21 **Q.** Yeah.

22 **A.** I just want to check.

06:06:06

23 Actually, as I now -- as I look at the  
24 Fazio article again, actually these, what I just  
25 described, are simply what Fazio, et al, described as the

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 adjustments to work with an elderly population. So, this  
2 is -- this, really, essentially is the way you should  
3 score this for individuals over the age of 60.

4 Q. Okay. All right.

06:06:24

5 A. So --

6 Q. We are going to get to the October test. You did the  
7 same test in October. Right?

8 A. Yes.

06:06:36

9 Q. Okay. So, the next test I want to ask you about in  
10 July was the A-Test. And you also scored that test as a  
11 pass. Right?

12 A. Yes.

13 Q. And didn't you do the same thing on that test? And  
14 we can put your test data on the screen. Do you recognize  
15 this --

06:06:52

16 A. Yes.

17 Q. -- the 7-13, Mr. Brockman's -- this is the test you  
18 administered?

19 A. Yes.

06:07:01

20 Q. And didn't you say in your report that he initially  
21 fell in the invalid range, and then you retested him?

22 A. Yes.

23 Q. And you gave him another test because you felt, well,  
24 he didn't do well enough the first time?

06:07:15

25 A. I thought because he had lost track of the

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 directions, lost track of the instructions; and, so, the  
2 test was not valid.

3 Q. So, that's your judgment, that the test was not  
4 valid --

06:07:26

5 A. Yes.

6 Q. -- in your professional opinion --

7 A. Yes.

8 Q. -- doing one criminal case?

9 A. Seeing thousands of patients.

06:07:33

10 Q. Okay. But isn't that determination informed by the  
11 evidence you have been given by the defense and the other  
12 information that you have been given by all the other  
13 doctors' reports, that he, in fact, has dementia?

06:07:52

14 A. My decision was informed by my observations of the  
15 patient, by looking at the -- his exam from May with Drs.  
16 Denney and Dietz. I am sitting there with the patient. I  
17 am looking at what he is doing, at -- at how he's  
18 responding to the -- to the stimuli. He looked out of it.  
19 And, so, a test can't measure what you want it to measure  
20 if the person has lost track of what the instructions are.

06:08:18

21 Q. Dr. Guilmette, is it at all possible that your  
22 opinion that he looked out of it is influenced by  
23 Mr. Brockman's motivation not to be prosecuted in this  
24 case? Did you consider that?

06:08:33

25 A. Yes.

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. But you still think he just looked out of it; so, you  
2 let him do the test again?

3 A. When I queried him about what he was thinking or what  
4 was going on in his mind during this test, as you can see  
06:08:45 5 from his comments, his comments are -- they reflect  
6 confusion, that he has lost track of the task demands of  
7 the test. So, I did not think it was an accurate  
8 reflection of his actual performance of what he could do  
9 on this test.

06:09:04 10 MR. SMITH: And just a housekeeping matter,  
11 Your Honor. The test score we're just marking for  
12 identification as 163.

13 THE COURT: Okay. You want to move to admit  
14 it?

06:09:14 15 MR. SMITH: No. No. These are just to -- I'm  
16 just marking for identification. It is just the test  
17 score, the test sheet.

18 BY MR. SMITH:

19 Q. But that determination, Dr. Guilmette, is based on  
06:09:28 20 nothing more than what Mr. Brockman told you sitting in  
21 the conference room when you're giving the test, isn't  
22 that true?

23 A. It is based on his history, the fact that he had had  
24 a delirium episode just the month before, the neuroimaging  
06:09:42 25 data. It is not just -- just one snapshot, one moment in



THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 time --

2 Q. Uh-huh.

3 A. -- that -- with a vacuum of any other information.

4 Q. Right. And some of that information is information

06:09:54

5 that's been provided to you by these doctors, like

6 Dr. York, Dr. Yu, Dr. Jankovic, Dr. Pool that evaluated

7 him in 2019; is that right?

8 A. Yes.

9 Q. And that influenced your judgment in deciding whether

06:10:09

10 Mr. Brockman is actually taking the test or if he is

11 trying to fool you and say, 'I am at a loss. I don't know

12 what's going on here'?

13 A. That's too simplistic a description. You're saying

14 that my -- my only view of Mr. Brockman was based on those

06:10:22

15 evaluations that you just described.

16 Q. Well, no. I am saying they are part of it.

17 A. Yes.

18 Q. You had a lot of things to look at.

19 A. Yes.

06:10:29

20 Q. But part of what you looked at were the doctors that

21 evaluated Mr. Brockman in 2019?

22 A. Part of it, yes.

23 Q. We are going to come back to those doctors in a

24 minute.

06:10:38

25 Now, I want to move to -- We are done with

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 July. Let's move to October. Let me ask you about -- and  
2 that's your report --

3 **A.** Can I get some water?

4 **Q.** Yeah. While you're getting some water, I am going to  
5 ask you about Exhibit 22, your October report.

06:10:50

6 THE WITNESS: Thank you.

7 BY MR. SMITH:

8 **Q.** Do you have that up there?

9 **A.** Yes.

06:11:13

10 **Q.** I just want to ask you about some of the validity  
11 tests you did in October.

12 The first one I want to ask you about is  
13 the Medical System Validity Test, which we've heard a lot  
14 about. You were asked a lot about Mr. -- Dr. Denney's  
15 administration of this test on direct. Do you remember  
16 that?

06:11:29

17 **A.** Yes.

18 **Q.** And you performed the exact same test -- I am going  
19 to mark this. This is your test scores from your October  
20 2nd exam. And we're at 164.

06:11:41

21 MR. LOONAM: Do you have a copy of this?

22 MR. SMITH: It's -- we got it from you. It's  
23 the only copy I've got. This is what you sent to us. This  
24 is his test results.

06:11:55

25 MR. LOONAM: In discovery?

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 MR. SMITH: Yeah. Yeah. I don't have another  
2 copy.

3 BY MR. SMITH:

06:12:06

4 Q. I just want to ask you about how you scored this  
5 test, Mr. Guilmette -- Dr. Guilmette.

6 So, I think you were asked a little bit  
7 about this on direct. Again -- and we looked at the chart  
8 that Dr. Denney did. You have the subtests, IR, DR, CNS,  
9 PA, FR across the top. Right?

06:12:25

10 A. Yes.

11 Q. You've got the easy tests and then the hard tests.  
12 Right?

13 A. Yes.

06:12:31

14 Q. And in looking at that those tests, you have to  
15 determine whether it's a pass or a fail. Right?

16 A. Yes.

17 Q. And you do a calculation -- if it's a possible  
18 Genuine Memory Impairment Profile, right --

19 A. Yes.

06:12:44

20 Q. -- then you have to do an additional Step 2  
21 calculation to determine if it actually is a GMIP or if  
22 it's not a GMIP. Right?

23 A. No. You have lost me.

24 Q. Okay. Let's turn the page.

06:13:03

25 Down at the bottom, do you see that?

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Yes.

2 **Q.** Isn't that the second step of the -- you talked about  
3 this on direct. If it's a possible Genuine Memory  
4 Impairment Profile, then you have to do this secondary  
5 calculation, if you have poor -- to determine whether its  
6 poor and consistent effort are identical by the following  
7 score patterns and both Criteria A and B are met. Right?  
8 Are you familiar with that?

9 **A.** Yes.

10 **Q.** All right. So, if you have a bunch of fails like  
11 Mr. Brockman had -- excuse me -- that indicates a Genuine  
12 Memory Impairment Profile, you are supposed to do the  
13 secondary calculation down at the bottom of the page.  
14 Right?

15 **A.** The -- the advanced interpretation profile, or the  
16 advanced interpretation program, was the one that  
17 generated the possible general memory impairment profile.

18 **Q.** Right.

19 **A.** So, that's what -- that -- that calculation is done  
20 by the -- by the program.

21 **Q.** Right. But, after you get the possible Genuine  
22 Memory Impairment Profile, to determine if it actually is  
23 genuine, you have to do this calculation here?

24 **A.** No.

25 **Q.** So, you don't -- that's not what this says?

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1 **A.** Well, I -- I did that, anyway.

2 **Q.** Yeah.

3 **A.** And, in fact, and -- and Mr. Brockman still generated  
4 the -- the Genuine Memory Impairment Profile.

06:14:28

5 **Q.** Okay. Well, let's walk through it. Criterion A --  
6 well, let's start from the beginning.

7 If both Criteria A and B are met, right,  
8 then it's an implausible result?

06:14:54

9 Criteria A, IR, DR or CNS are below 85  
10 percent, and Mr. Brockman's IR, DR, and CNS are below, or  
11 at least two of them are below 85 percent?

12 **A.** Yes.

13 **Q.** That is why it says fail/fail?

14 **A.** Right.

06:15:07

15 **Q.** So Criteria A, check, that's done, right?

16 **A.** Yes.

17 **Q.** So now you go to Part B. You have to have A and one  
18 of the five subparts of Part B, right? Isn't that what  
19 this says?

06:15:21

20 **A.** I don't -- this is a -- this is done by the Advanced  
21 Interpretations Program.

22 **Q.** Right. Right. No, I understand. Let's walk through  
23 it. Okay?

24 **A.** Okay.

06:15:31

25 **Q.** Part B, any of the following are met: The mean of

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1 the easy MSVT subtests is not at least 20 points or higher  
2 than the mean -- well, I'll grant that's not met, okay?

3 **A.** That is right.

4 **Q.** Well, I want to direct your attention to Number 4.

06:15:53 5 IR minus DR is greater than or equal to 15.

6 Do you see that?

7 **A.** Yes.

8 **Q.** Where my pen is pointing?

9 **A.** Yes.

06:16:00 10 **Q.** So if that is met, then you have A is met, B is met,  
11 and you have an implausible profile, isn't that right?

12 Isn't that what that says?

13 **A.** Yes.

14 **Q.** Right. So IR minus DR, greater than or equal to 15,  
06:16:24 15 simple, elementary school math, right? IR is 90, DR is

16 65. What is 90 minus 65?

17 **A.** 25.

18 **Q.** Is 25 larger than 15?

19 **A.** Yes.

06:16:41 20 **Q.** Criteria B is met, correct?

21 **A.** That's -- yes. That's what that says.

22 **Q.** So, according to this test, Mr. Brockman failed this  
23 validity test, isn't that right?

24 **A.** It would appear so.

06:17:02 25 **Q.** Okay. Another test I want to ask you about that you

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1 administered is the Rey-15 test, which you did in July,  
2 but you also did it in October, right?

3 **A.** Yes.

4 **Q.** And I probably lost my sheet. Here it is. When I  
06:17:24 5 was --

6 MR. SMITH: Already been in evidence as 124,  
7 Your Honor.

8 BY MR. SMITH:

9 **Q.** It is this test, right, just so everybody is on the  
06:17:30 10 same page?

11 **A.** Yes.

12 **Q.** It is this test.

13 And you have been mentioning the Fazio  
14 article, so let's -- which guides you in the  
06:17:42 15 neuropsychology field on how to score these tests, right?

16 **A.** Yes, this test.

17 **Q.** This test. That's right. This test.

18 MR. SMITH: And I have copies, Your Honor.

19 MR. LOONAM: Thanks.

06:18:13 20 MR. SMITH: I also have a copy -- I forgot I  
21 also have a copy of that test sheet.

22 MR. LOONAM: What did you mark that?

23 MR. SMITH: I haven't marked this one yet.

24 MR. LOONAM: No, the test sheet.

06:18:25 25 MR. SMITH: Oh, I can tell you. Hold on one

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1 second.

2 MR. LANGSTON: 164.

3 MR. SMITH: You got it? Thank you.

4 MR. LOONAM: Thanks.

06:18:36 5 MR. SMITH: So this article we're going to mark  
6 as 165. This is the Fazio article that there has been some  
7 testimony about. If I may approach, Your Honor.

8 THE COURT: You may approach.

9 MR. SMITH: I will give the witness a copy.

06:18:46 10 THE WITNESS: I have a copy.

11 BY MR. SMITH:

12 Q. You do?

13 A. Yes.

14 Q. Okay. It is just for marking it for identification,  
06:18:56 15 so this test, what Fazio says, it's on page -- if I can  
16 read this, page 6. I think that's page 6. Yeah. This is  
17 the passage I want to draw your attention to,  
18 Dr. Guilmette.

19 A. Okay.

06:19:25 20 Q. And --

21 MR. LOONAM: Which page are you on? I'm sorry.  
22 Page 6?

23 MR. SMITH: Page 6, yeah.

24 MR. LOONAM: Thanks.

06:19:33 25 BY MR. SMITH:

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com



THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. This is what we were talking about, true positives  
2 minus false positives minus intrusions, right?

3 A. Yes.

4 Q. This resulted in scores ranging from 18 to --  
06:19:46 5 negative 18, plus 15. Scores of less than 2 were uncommon  
6 in only 87 percent of the sample, so on and so forth,  
7 produces scores of negative 2 of all ages 60 plus.

8 And then if we go to the top, this chart  
9 here that I am pointing at right here --

06:20:03 10 A. Yes.

11 Q. -- this tells you that if you're under zero, that  
12 only 3.9 percent of the test takers were in that range; is  
13 that right?

14 A. Yes.

06:20:12 15 Q. Okay. So let's -- enlightened by Professor Fazio,  
16 let's look at how Mr. Brockman did on this test. Do you  
17 recognize this?

18 A. Yes.

19 Q. This is Mr. Brockman's test sheet, right, from  
06:20:30 20 October when you did the Rey-15 test, right?

21 A. Yes.

22 MR. SMITH: I'll mark that as 166, again for  
23 demonstrative purposes, Your Honor.

24 MR. LOONAM: Which one is this?

06:20:49 25 MR. SMITH: This is --

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1 MR. LOONAM: Oh, different article.

2 MR. SMITH: No. No. This is the test.

3 MR. LOONAM: Thanks.

4 BY MR. SMITH:

06:21:00 5 Q. And then there is a second part of the test, right,  
6 Dr. Guilmette?

7 A. The recognition part?

8 Q. Yeah.

9 A. Yes.

06:21:06 10 Q. Let's look at that. Do you see that?

11 A. Yes.

12 Q. And you have actually -- this is your writing here,  
13 right?

14 A. Yes.

06:21:21 15 Q. True positives, false positives, four, four?

16 A. Yes.

17 Q. Right? So Professor Fazio's calculation is true  
18 positives, minus false positives, minus intrusions, is how  
19 you score the test, right?

06:21:34 20 A. For the combination score.

21 Q. The combination score, yes. Four minus four is zero?

22 A. Yes.

23 Q. And then you have to look at this part of the test?

24 A. Yes.

06:21:49 25 Q. And whether or not there is an intrusion there,

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 right?

2 **A.** Yes.

3 **Q.** And how did you score this?

4 **A.** I believe that that was a perseveration on the Number

06:22:02

5 3.

6 **Q.** I'm sorry?

7 **A.** I thought what was a perseveration.

8 **Q.** You are going to have to explain what that is.

9 **A.** That is that he simply kept repeating himself, so he

06:22:09

10 drew ABC, 123, and then drew a 3 again.

11 **Q.** But if that's this little -- the -- the -- let's go  
12 the other way. If that little mark down here, if -- here?

13 **A.** Yes.

14 **Q.** If that's an intrusion, then he's got a negative one?

06:22:32

15 **A.** It is not an intrusion in my opinion.

16 **Q.** I am asking if it is. If it is.

17 **A.** Yes.

18 **Q.** If not, he has got zero; if it is, it is a negative  
19 one?

06:22:39

20 **A.** Yes.

21 **Q.** But in your judgment, that is what I am asking you  
22 about really, is your judgment, you count that as a three?

23 **A.** Yes. Yes. Actually, when you enlarge like that it  
24 even looks more like a three. Yes.

06:22:53

25 **Q.** Okay. But if it is not, it is still a zero, right?

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1 **A.** Yes, it is. Right. Yes.

2 **Q.** And so how did you score this test for Mr. Brockman?

3 **A.** So -- you're right. So, the new combination score is  
4 a zero which is found in 6.8 percent of the sample. If  
06:23:07 5 you see here, see the zero, the cumulative percent, 6.8  
6 percent, and then you see actually where you're showing  
7 here the pattern analysis of scores.

8 So when I calculated his performance on a  
9 pattern analysis, which requires three different things to  
06:23:23 10 happen; recall less than three, true positives less than  
11 three, false positives greater than five, Mr. Brockman met  
12 none of those criteria.

13 So according to the pattern analysis, that  
14 is explained in the column that's beneath what I can see  
06:23:39 15 here, in fact, you can see some of them, again, that is  
16 what the authors call actually a more accurate way of  
17 looking at a disingenuous performance than compared to the  
18 -- to the combination score.

19 **Q.** But you scored this as a pass?

06:23:54 20 **A.** I scored it both -- yes. Yes.

21 **Q.** And according to Fazio, that means that Mr. Brockman  
22 is in the 3.9 percent, right?

23 **A.** No, 6.8 percent.

24 **Q.** I'm sorry. 6 -- zero, right, less than zero, 6.8.

06:24:11 25 3.9 if it was in -- if that little mark is an intrusion,

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1 but it's 6.8?

2 **A.** Yes.

3 **Q.** All right. So you, in your judgment, put him in the  
4 6.8 as opposed to the 93.2, right?

06:24:22

5 You put him in the pot that -- in that  
6 smaller pot?

7 You are saying, he actually wasn't  
8 malingering. He's in that little tiny population of truly  
9 demented people at little 6.8?

06:24:33

10 **A.** I am saying that that was the -- that a score of zero  
11 appears or occurs -- a score of zero or less occurs in 6.8  
12 percent of the sample and, as I had also mentioned, the  
13 profile analysis is completely normal with regard to  
14 identifying a disingenuous performance.

06:24:51

15 And the authors make the claim that the  
16 profile analysis is a stronger marker of -- of invalidity  
17 than their combination scorings.

18 **Q.** What goes into the profile analysis?

19 **A.** As I had mentioned, so there are -- there are --

06:25:06

20 there are three things; one is, does the patient score --  
21 does the patient generate less than three on recall?  
22 That's one.

23 Another one is -- and then, and -- are  
24 there -- does the person make fewer than three true

06:25:21

25 positive responses on recognition, or make more than five

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1 false positive errors on recognition?

2 If you have a failure on the first item,  
3 that is the recall less than three, then if you then have  
4 a fail on the other two, then that -- that profile was  
06:25:40 5 obtained by zero percent of their sample.

6 And Mr. Brockman never gets --  
7 Mr. Brockman passes the -- their profile analysis.

8 Q. But on the combined score, you as a test scorer,  
9 you're putting him in the 6.8 percent people that score in  
06:26:00 10 that range as being truly demented. That is a judgment  
11 you're making, right?

12 A. I am making a judgment that that is -- that that was  
13 his score based upon their combination profile.

14 Q. Right. Let's go to the Coin-in-the-Hand Test, which,  
06:26:16 15 again, I have your score sheet from October 2nd that I am  
16 going to mark as 167.

17 And you have already described this on  
18 direct, so we won't go through it again. This is when you  
19 put the coin in the hand and get him to guess what coin.

06:26:37 20 He actually made three errors; is that  
21 right?

22 A. Yes.

23 Q. And two is normally a fail, right?

24 A. No. Three is a fail.

06:26:48 25 Q. So he failed this test?

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 A. Yes.

2 Q. But you didn't score it that way, you scored it as a  
3 pass?

4 A. No, I think I scored it as a fail.

06:26:55 5 Q. So he did fail this test?

6 A. Yes.

7 Q. Oh, okay. Then we can move on. So he did fail one  
8 validity test in October?

9 A. He -- although -- although --

06:27:04 10 Q. Two, we got two now, the MSVT and the Coin in the  
11 Hand?

12 A. Although, again, however, I would say that other data  
13 indicates that -- that the -- that the cutoff score of  
14 seven or more -- of seven or fewer correct, will result in  
06:27:20 15 a significant number of false positive errors.

16 Q. I am not going to get into that, but you scored it as  
17 a fail?

18 A. I did.

19 Q. Okay. And then he failed the MSVT. We just went  
06:27:34 20 through that calculation, right?

21 A. Yes.

22 Q. Okay. One last test I want to ask you about which  
23 you discuss on page 18 of your -- the CPT 3 test.

24 How did you score this test for

06:28:03 25 Mr. Brockman?

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** How did I score it?

2 **Q.** Yes.

3 **A.** Well, it is computer scored.

4 **Q.** So how did it score?

06:28:08 5 **A.** It showed that he made a significant number of  
6 especially omission errors.

7 **Q.** Which I am marking for identification as 168. This  
8 is the report that came out?

9 **A.** Yes.

06:28:21 10 **Q.** So, go ahead. What does that mean?

11 **A.** That when the target stimuli was shown, he -- he  
12 failed to respond to it.

13 **Q.** And what does that mean?

14 **A.** That means he was very inattentive.

06:28:37 15 **Q.** If the error -- isn't it a consensus in the field  
16 that if the error rate exceeds 25 percent, that that's a  
17 fail?

18 **A.** No.

19 **Q.** Let me just ask you a couple questions about this.

06:28:55 20 Are these bars where I am pointing, those are at the fail  
21 rate, right?

22 **A.** Well, this is not the sort of test that has a  
23 pass/fail.

06:29:09 24 **Q.** I'm sorry. Not the fail rate. The error rate. The  
25 errors that he made, right, he made a large number of

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com



THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 errors?

2 **A.** Yes.

3 **Q.** Is that what is depicted on the graph?

4 **A.** Well, it depends. Those actually are described as T

06:29:19

5 scores. They are not all errors. Some have to do with

6 reaction time. Some have to do with variability of his

7 reaction time.

8 So it's not just -- all those -- all those

9 things that you see on the left-hand side are -- some of

06:29:34

10 those reflect errors, some of them have nothing to do with

11 errors.

12 **Q.** So, again, how is he scored on this? How did the

13 computer score him on this with all these errors?

14 **A.** I'm not sure -- so, you -- you see that -- his T

06:29:48

15 scores, his --

16 **Q.** Right.

17 **A.** -- his performance on many of these -- many of these

18 fall outside the normal limits.

19 **Q.** Okay. And that is a fail?

06:29:56

20 **A.** There is no failure.

21 **Q.** Okay.

22 **A.** That is not how it is scored.

23 **Q.** So how is it scored?

24 **A.** It's a -- it's a performance relative to the

06:30:06

25 normative group.

KATHY MILLER, RMR, CRR - kathy@millers-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. And how did Mr. Brockman do against the normative  
2 group?

3 A. Mr. Brockman made many more errors, was much slower  
4 than -- than others in his age group.

06:30:24 5 Q. And so that he fell out of the valid range?

6 A. He fell outside of the normal range.

7 Q. Yeah.

8 A. Or the average range.

9 Q. Yeah. So -- and this is a validity test, right?

06:30:34 10 A. No.

11 Q. It is not a validity test?

12 A. It's -- no.

13 Q. But he fell outside the normal range?

14 A. Yes.

06:30:39 15 Q. Okay. So let's summarize now. So we had validity  
16 tests that you administered in May -- I'm sorry, July.  
17 Validity tests you administered in October. How many --  
18 we know he failed two?

19 A. I still actually -- you know, what I --

06:30:56 20 Q. In October --

21 A. Pardon me. I am -- you know, I would need to spend  
22 more time with the MSVT data.

23 Q. Well, we did the math.

24 A. We did the math.

06:31:05 25 Q. We followed the instruction sheet and it comes out as

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 a fail?

2 **A.** But, still, but the -- the AI profile created or  
3 generated a possible memory -- a possible genuine memory  
4 impairment.

06:31:20

5 **Q.** Right. And when you have a genuine memory  
6 impairment, you do the math in step two to see if it is a  
7 real memory impairment or if it is implausible profile.  
8 We did the math right here live, and it came out following  
9 the instructions in the test that it was a fail.

06:31:35

10 So let's move on.

11 I want to ask how many tests did  
12 Mr. Brockman fail for you in the July exam? Validity  
13 tests. How many validity tests did he fail --

14 **A.** I --

06:31:48

15 **Q.** -- in July.

16 **A.** In July?

17 **Q.** Two, right? Two?

18 **A.** The -- perhaps the MSVT and Coin-in-the-Hand Test.

19 **Q.** And then in October how many did he fail?

06:32:04

20 **A.** I'm sorry. That was -- I thought you were referring  
21 to October.

22 **Q.** So October was two. How many in July the first time?

23 **A.** In July? I don't know that he failed any. Did he  
24 fail? No.

06:32:23

25 I mean the A-Test, he initially failed;

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 but I thought that was -- that that was truly a -- a false  
2 positive fail.

3 Q. What does that mean, a false positive?

4 A. Meaning that he failed it, but not because he was --  
06:32:37 5 not because of inadequate effort. He failed it because he  
6 became too confused.

7 Q. Right. Right. And that is your judgment, that he  
8 became too confused?

9 A. Yes.

06:32:44 10 Q. That is your interpretation of what you saw?

11 A. Yes.

12 Q. Okay. So are you familiar with the -- well, we have  
13 talked about it, the article, The Clinical  
14 Neuropsychologist, and the consensus in the field, in your  
06:33:00 15 field, that two or more failed validity tests indicates  
16 that the -- it's a fail, and that the cognitive testing is  
17 unreliable? Isn't that -- I think you already said that.

18 A. Yes.

19 Q. Okay.

06:33:11 20 A. Except in cases of dementia, or of severe brain  
21 injury, or severe psychotic illness.

22 Q. And actually the consensus opinion of the American  
23 Academy of Clinical Neuropsychologists, which we have now  
24 marked for identification as 162, says it is even possible  
06:33:30 25 that one failed test could indicate unreliable testing?

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Oh, no, I -- well, I mean the -- upwards of 40  
2 percent of -- of individuals who have no incentive to fake  
3 bad, or whose testing is completely valid will -- will  
4 fail one validity test.

06:33:53

5 **Q.** But that's the key, isn't it? That's -- do they have  
6 a motivation to fail? Do they a motivation to malingering?  
7 Isn't that what this is about?

8 **A.** Well --

06:34:12

9 **Q.** Let me show you 162 again. This is the American  
10 Academy of Neuropsychologists Consensus Report from 2021,  
11 marked as 162.

12 "However, a single invalid PVT performance  
13 within a large test battery can indicate a transient  
14 validity problem."

06:34:29

15 **A.** Yes. Yes. However, also in that document is a  
16 statement that with increasing deficits, especially in  
17 dementia, severe head injury with loss of consciousness,  
18 significant psychiatric illness, that there is the  
19 expectation that patients will fail more PVTs, or their  
20 performance will be less well on PVTs, not because of  
21 invalidity issues but rather because of a genuine memory  
22 deficit.

06:34:51

23 **Q.** Right. So that is what I am asking you about  
24 Dr. Guilmette, that presupposes that the patient actually  
25 has dementia?

06:35:06

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Yes.

2 **Q.** So you are presupposing that he has got dementia, you  
3 are testing him for dementia, so you are making a judgment  
4 about the patient in order to interpret the test?

06:35:19 5 **A.** I made a judgment first about the dementia and then  
6 considered his performance on the validity test.

7 **Q.** Exactly. Exactly. And that is what I am asking you  
8 about. You already determined that he had dementia before  
9 you tested him, isn't that right?

06:35:31 10 **A.** No. No. No. No. No. At the time I take -- when I  
11 saw him, that is when -- after I saw him, is when I made  
12 the determination of dementia. I didn't go into the  
13 evaluation presuming that he was demented.

14 **Q.** All right. Let me show you another part of the  
06:35:50 15 American consensus on neuropsychology, another page, it's  
16 page 1067.

17 A determination of malingering may be  
18 appropriate even when all PVT, validity tests, are passed,  
19 depending on the entire test data. Right?

06:36:08 20 **A.** Yes. Uh-huh.

21 **Q.** So, you have to look at the whole picture, but this  
22 is what I am asking you about: In your judgment, you're  
23 scoring the test as if Mr. Brockman already has -- you  
24 have already determined he has got dementia?

06:36:22 25 **A.** When you say "already," at what -- at what time frame

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 are you --

2 Q. When you're testing. When you're testing him.

3 A. At some point you make a diagnosis. At some point  
4 you make a determination.

06:36:32 5 Q. Okay. Well, that's what I am asking you.

6 A. So what's the question?

7 Q. The question is: Isn't it true that when you're  
8 testing him in October and in July, you're already testing  
9 him, making a determination that he has dementia, which  
06:36:51 10 influences how you score the test? Like giving him a  
11 second chance? Where you put him on the statistical  
12 curve? He is in the population of demented patients that  
13 take -- you compare him against other demented patients,  
14 isn't that what you're doing?

06:37:06 15 A. After I made the determination that I thought he had  
16 dementia.

17 Q. That's right. That's what I am asking you. Okay.

18 Now, the other thing -- oh, yeah. Before  
19 I move on from the testing. One more article I want to  
06:37:23 20 show you, the American Academy of Clinical Neuropsychology  
21 Consensus Conference in 2009. You were a member of that  
22 conference, weren't you?

23 A. Yes.

24 Q. You weren't a member of the 2021, but you were a  
06:37:36 25 member in 2009?

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Yes.

2 **Q.** Are you aware that Dr. Denney was a member of the  
3 consensus conference in 2021?

4 **A.** No.

06:37:42

5 **Q.** He was. He testified to that Monday, Tuesday, last  
6 week. Were you aware of that?

7 **A.** No.

8 **Q.** Okay. So, you drafted a part of this consensus  
9 conference. Right?

06:37:57

10 **A.** Yes.

11 **Q.** The section on "Ability"?

12 **A.** Yes.

13 **Q.** And didn't you say --

14 MR. SMITH: Well, I guess I have to mark this.

06:38:03

15 That's right. I am going to mark this as 169.

16 MR. LOONAM: Is that your only copy?

17 MR. SMITH: No. No. I am getting it for you.

18 MR. LOONAM: Thanks.

19 MR. SMITH: Here you go.

06:38:28

20 MR. LOONAM: Thank you, sir.

21 BY MR. SMITH:

22 **Q.** I just want to ask you about some sections that you  
23 wrote in what I am showing you, 169. Do you want a copy?

24 **A.** I don't have a copy. If I can see it here, that

06:38:42

25 would be fine.



THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. Yeah. Yeah. I'll see if I can get this on the  
2 screen.

3 MR. LOONAM: Which page are you going to?

4 MR. SMITH: Yeah. Give me a second. 1100.

06:38:52

5 MR. LOONAM: Thanks.

6 BY MR. SMITH:

7 Q. Do you want to take a second and get to that page,  
8 Dr. Guilmette?

06:39:20

9 Actually, I want to go to 1101 first,  
10 Page 1101. I will put it on the screen. Can you see  
11 that?

12 A. Yes.

06:39:34

13 Q. So, this is a part of the 2009 consensus statement  
14 for neuropsychologists that you wrote or that you  
15 co-authored; is that right?

16 A. Yes.

06:39:53

17 Q. And did you say here that, in order to determine  
18 malingering or less than full performance for secondary  
19 gain, you have to look at scores that are below chance --  
20 Well, let me rephrase the question.

21 Initially, what you're commenting on is  
22 the way your field was initially doing this was it had to  
23 be -- the scores had to be significantly below chance to  
24 be malingering?

06:40:06

25 A. Yes.

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. And then you write this part of the article that  
2 says, 'Well, that's wrong. It can be just slightly below  
3 chance.'

4 A. I don't see where it says that.

06:40:18

5 Q. "Additional research is now well known that invalid  
6 performance can be identified using thresholds that are  
7 well below" -- "above a level that is significantly below  
8 chance."

9 A. Yes.

06:40:31

10 Q. Isn't that what that says?

11 A. Yes.

12 Q. So, the old thinking was it has to be significantly  
13 below chance to be malingering, to be invalid, but what  
14 you were saying in '09 with your coauthors is that, no, it  
15 could be above significantly below, something -- a larger  
16 number?

06:40:42

17 A. It simply -- however, it's not talking about  
18 malingering. It's simply talking about invalidity, number  
19 one.

06:40:51

20 Q. Uh-huh.

21 A. And, number two, this does not address the issue of  
22 testing older adults or significantly older adults with  
23 dementia.

06:41:05

24 Q. Okay. Okay. But -- so, there is -- there is dispute  
25 in your field about how to score some of these tests and

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 where to put the score and how to interpret it, depending  
2 on where they fall in the statistical curve. Right?

3 **A.** Not to call it something significantly below chance.  
4 "Significantly below chance" still remains a concept that  
06:41:24 5 has not been -- for which there is still not consensus.  
6 This is simply talking about a cutoff for invalidity,  
7 which is different from a significantly-below-chance  
8 performance.

9 **Q.** But invalidity -- that's what we have been talking  
06:41:38 10 about all evening, invalid validity tests. Right? If you  
11 get an invalid score, it means you're trying to fail the  
12 test?

13 **A.** Not necessarily. An invalid score can occur because  
14 of fatigue, because of genuine memory deficits. I'm  
06:41:53 15 trying to make the distinction between invalidity versus  
16 malingering.

17 **Q.** Right. No. I didn't mean to say malingering. I'm  
18 not in your field. I misspoke. I meant invalidity.

19 You are saying here that to determine  
06:42:04 20 invalidity it doesn't have to be all the way at the end of  
21 the curve; it can be something a little bit higher?

22 **A.** Oh, sure.

23 **Q.** That's what you are saying here?

24 **A.** Yes.

06:42:12 25 **Q.** And that's the difference, is it not, between you and

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Dr. Denney? Dr. Denney scored it but statistically a  
2 little bit different than you did. You went to the far  
3 end of the curve for Mr. Brockman. And when you had to  
4 exercise your judgment, you presupposed he had dementia.

06:42:31

5 So, you always pushed him in the bottom end, and you  
6 counted the score as valid because he had dementia, in  
7 your opinion?

06:42:45

8 **A.** No. So, Dr. Denney took a score that was not -- that  
9 he claimed was significantly below chance as an indicator  
10 of malingering. So, he said -- the smoking gun of intent,  
11 as he described.

12 **Q.** Right.

06:43:02

13 **A.** Right? Okay. So, there is -- there is -- his  
14 decision to say that -- that a P value of .075, that's  
15 statistically below chance is his opinion.

16 There is -- my point is that there is no  
17 consensus on what should basically be below chance, when  
18 you're talking about a fact of malingering versus testing  
19 validity.

06:43:16

20 **Q.** Right. And we already went over that and we are not  
21 going to go over it again. But what I'm asking you:

22 Isn't that essentially what you're saying in your own  
23 article in '09, that this is a fluid analysis, and that  
24 only looking at scores as invalid that are significantly

06:43:32

25 below chance is something that you shouldn't do? Isn't

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 that what you're saying?

2 **A.** No. No. I am not saying that.

3 **Q.** All right. Let's move on to another page of your  
4 article or your section of the consensus opinion. I want  
5 to move and switch gears to what you say on Page 1100, and  
6 I have got it on the screen.

7 Do you see that?

8 **A.** Yes. I see three highlighted areas.

9 **Q.** All right. I want to direct your attention to where  
10 it says, "Real world behavior can be essential in  
11 addressing the possibility of malingering."

12 **A.** Okay.

13 **Q.** What does that mean?

14 **A.** That means does the person exhibit evidence of  
15 impairment in their everyday life?

16 **Q.** And if they don't -- Well, let me ask it this way.

17 So, real world behavior, what do you mean  
18 by that?

19 **A.** Oh, that can mean being able to take care of one's  
20 self, pay your bills, drive, function in society.

21 **Q.** Could it include things like giving depositions,  
22 giving speeches, looking at their behavior at the  
23 workplace?

24 **A.** It could.

25 **Q.** So, those are real world behaviors, right --

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Yes.

2 **Q.** -- that, according to you, Dr. Guilmette, are  
3 essential in determining if someone is malingering?

4 **A.** It's part of it.

06:45:08

5 **Q.** Well, that's what you said in the article in 2009.  
6 Right?

7 **A.** Well, I didn't -- you know, this was an article  
8 written by 20 people. So, I didn't necessarily write that  
9 particular line. But I agree that review of everyday

06:45:24

10 behavior is an important component in assessing  
11 malingering.

12 **Q.** So -- and you have to compare the real world  
13 behavior. And we know in this case, in 2019, Mr. Brockman  
14 gave a deposition, in January of 2019. He gave a  
15 deposition in September 2019. He gave speeches in  
16 November of 2018 and December of 2019 in which -- and,  
17 according to the testimony and the depositions, he  
18 performed really well.

06:45:43

19 **A.** Uh-huh.

06:45:58

20 **Q.** Are you aware of that?

21 **A.** Yes.

22 **Q.** Now, in 2019 he was also examined by Dr. York twice.  
23 Right?

24 **A.** Yes.

06:46:05

25 **Q.** And you have reviewed those records?

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Yes.

2 **Q.** Did Dr. York make any comment on -- Before I talk  
3 about Dr. York, in your field what you call that is  
4 collateral contrary evidence -- contradictory evidence.

06:46:24

5 Right? Are you familiar with that term?

6 **A.** Con --

7 **Q.** Contradictory evidence.

8 **A.** Okay.

9 **Q.** Collateral contradictory evidence.

06:46:31

10 **A.** Well, I am not familiar with that phrase  
11 specifically, but --

12 **Q.** All right. All right. So, let's just talk about  
13 what Dr. York did in 2019.

14 So, you reviewed Dr. York's reports of her  
15 testing of Mr. Brockman in 2019. Right?

06:46:40

16 **A.** Yes.

17 **Q.** In March and then in December?

18 **A.** Yes.

19 **Q.** When you reviewed those reports, did she mention  
20 anything about the deposition? Let's just start with  
21 March.

06:46:52

22 In her March report, which was six weeks  
23 after he gave a deposition on January 16th, did she  
24 comment on that deposition?

06:47:03

25 **A.** Not that I remember.

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. Did she analyze it compared to her testing?

2 A. No.

3 Q. Did she talk about at all in her report about the  
4 motive to fabricate or exaggerate symptoms by  
5 Mr. Brockman?

06:47:14

6 A. No.

7 Q. Did she talk about the secondary gain, the motive for  
8 secondary gain?

9 A. No.

06:47:22

10 Q. Did she talk about a timeline of the fact that  
11 Mr. Brockman -- there was this search warrant -- and I am  
12 going to get to that more in a minute -- but there was a  
13 search warrant on September 5th of 2018?

14 A. Yes.

06:47:38

15 Q. And that there was a timeline of this criminal  
16 investigation, and that by March of 2019 he knew about the  
17 criminal investigation. Right?

18 A. I -- I am not exactly sure when he became aware of  
19 the investigation. Oh, by 2019, did he --

06:47:53

20 Q. Yeah.

21 A. Yes. Yes.

22 Q. Don't you say in your report --

23 A. Yes.

06:47:57

24 Q. -- that you were told he became aware of the criminal  
25 investigation in September 2018?



THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Okay.

2 **Q.** So, by March of 2019, when Dr. York is evaluating  
3 him, he already knows about the criminal investigation?

4 **A.** Yes.

06:48:10 5 **Q.** Did she comment on that?

6 **A.** No.

7 **Q.** So, in March of 2019, she did not comment on the  
8 motivation to fabricate to avoid criminal prosecution, the  
9 fact that he didn't report any symptoms to any doctors  
06:48:26 10 till after September, the timeline, and the motivation --  
11 the motivation to fabricate or the -- or the deposition he  
12 had just given six weeks ago?

13 **MR. LOONAM:** Your Honor, that's a really long  
14 question.

06:48:39 15 **MR. SMITH:** I can -- I'll break it up. I'll  
16 break it up.

17 **THE COURT:** You can break it up. I mean, just  
18 one at a time. Did she comment on this? Did she comment  
19 on that?

06:48:46 20 **BY MR. SMITH:**

21 **Q.** Did she comment on the deposition in January 2019?

22 **A.** No.

23 **Q.** Did she comment on the motivation to get -- for  
24 secondary gain to avoid prosecution?

06:48:56 25 **A.** No.

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. Did she comment on the timeline of knowing about the  
2 criminal investigation?

3 A. No.

4 Q. What about in December? Are you aware of the fact  
06:49:05 5 that there was another deposition in September of 2019  
6 with the Federal Trade Commission?

7 A. Yes.

8 Q. And you reviewed Dr. York's report in December 3rd of  
9 2019 --

06:49:21 10 A. Yes.

11 Q. -- two months after that deposition? In her report,  
12 did she comment on that deposition just six weeks earlier?

13 A. No.

14 Q. Did she comment on the motivation to fabricate or  
06:49:31 15 avoid secondary gain in the criminal case?

16 A. No.

17 Q. Did she even comment on the criminal case?

18 A. No.

19 Q. So, according to Dr. Guilmette, she ignored real  
06:49:44 20 world evidence?

21 A. She was unaware of it, apparently.

22 Q. Okay. Doesn't that impact her ability to test  
23 Mr. Brockman's cognitive ability if she is unaware of real  
24 world evidence?

06:49:58 25 A. Well, she did receive some evidence or some report

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 from Mrs. Brockman and also their son.

2 Q. But apparently not the deposition --

3 A. Correct.

4 Q. -- no comment about the criminal case and what

06:50:17 5 motivations it may instill in Mr. Brockman. Right?

6 A. Correct.

7 Q. And Dr. Guilmette says that that's essential; is that  
8 right?

9 A. Ultimately, that is an important part of the

06:50:28 10 evaluation.

11 Q. What about the October 7th?

12 A. October 7th --

13 Q. Dr. York, her evaluation of Mr. Brockman on October  
14 7th.

06:50:45 15 A. In 2020?

16 Q. Yes.

17 A. What about it?

18 Q. Well, did you review it?

19 A. Yes.

06:50:50 20 Q. Okay. And in that examination she also ignored the  
21 criminal case, the depositions, didn't she?

22 A. Yes.

23 Q. She also ignored the fact that he was still running  
24 Reynolds and Reynolds, didn't she?

06:51:13 25 A. I don't recall exactly what she commented on

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THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 regarding his work situation.

2 Q. Well, you reviewed her report. I can give it to you  
3 if you want to look at it. Did she comment on the fact  
4 that he was still -- in October of 20 -- October 7th,  
5 2020, Mr. Brockman was still running Reynolds and  
6 Reynolds?

7 A. It -- I'm sorry. Is that what she said or --

8 Q. I am asking you if she commented in her medical  
9 report that on October 7 of 2020 Mr. Brockman was still  
10 running Reynolds and Reynolds?

11 A. I don't recall.

12 MR. SMITH: What is the -- I believe this is  
13 Defense Exhibit 35.

14 MR. LOONAM: Which one is this?

15 MR. SMITH: Defense Exhibit 35. This is the  
16 October 7th medical report by Dr. York.

17 MR. LOONAM: York?

18 MR. SMITH: Yeah.

19 BY MR. SMITH:

20 Q. I'm just going to show you where she does her  
21 conclusions, Dr. Guilmette.

22 A. Okay.

23 Q. Well, first of all, what she says is that he has got  
24 dementia with mild to moderate severity, right here.

25 Right?

KATHY MILLER, RMR, CRR - kathy@millers-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Yes.

2 **Q.** And is there any comment in there at all or any  
3 analysis or reference to the fact that he's still running  
4 a multi-billion-dollar software company on October 7th of  
5 2020?

06:52:51

6 **A.** There is no mention of that.

7 **Q.** Okay. So, Dr. York examines Mr. Brockman in January  
8 of 2019 -- I'm sorry -- March 2019, in December 2019 and,  
9 again, in October 7th of 2020?

06:53:25

10 **A.** Yes.

11 **Q.** And she doesn't refer to any things that are  
12 happening outside of the examination room, that  
13 Mr. Brockman is involved in the depositions, the running  
14 of the company, e-mails that he is sending to underlings  
15 in Reynolds, none of that is in her reports?

06:53:35

16 **A.** Correct.

17 **Q.** But you still reference her report in your reports;  
18 isn't that true?

19 **A.** Yes.

06:53:42

20 **Q.** And what I want to ask you about here is this REM  
21 behavior disorder here --

22 **A.** Yes.

23 **Q.** -- that she references. She actually references that  
24 in all three of her reports. Right?

06:53:53

25 **A.** Yes. I think so.

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. And you rely on that. Right?

2 A. I don't believe that he has a REM behavior disorder.

3 Q. Right. Right. But there was a sleep study done in  
4 August where the sleep study -- the doctor conducting the  
5 sleep study determined he did not have REM disorder.

6 Right?

7 A. Was that the one that there was not enough sleep  
8 time? Because he has had two sleep studies.

9 Q. Right.

10 A. I know the first one -- and I don't recall the  
11 dates -- the first one revealed that there was not enough  
12 REM behavior, there was not enough REM sleep to make that  
13 diagnosis.

14 Q. Yeah. Let me show you the one in August, as soon as  
15 I get the exhibit number.

16 MR. SMITH: Do you remember what number this  
17 is?

18 MR. LANGSTON: It's like 42, Corey.

19 MR. SMITH: 42. Thank you. So, this is  
20 Government's Exhibit 42.

21 MR. LANGSTON: It should be in evidence.

22 MR. SMITH: Yeah, this is already in evidence.

23 BY MR. SMITH:

24 Q. This is the sleep study in August. Did you review  
25 these?

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** Yes.

2 **Q.** I'm just going to draw you right to the conclusion,  
3 and I am almost done. I know it's getting late.

4 412 minutes of sleep, the duration of the  
5 sleep, normal REM latency. Do you see that?

06:55:11

6 **A.** Hold on a second. Can you put that --

7 **Q.** I'm sorry.

8 **A.** The duration of REM sleep was 47 minutes. Okay.  
9 Normal REM latency. Okay. Uh-huh.

06:55:34

10 **Q.** Page 2. There was no loss of normal --

11 MR. LOONAM: Is that 42? I'm sorry.

12 MR. SMITH: Yes, it's 42.

13 MR. LANGSTON: It is the August sleep study.

14 BY MR. SMITH:

06:55:46

15 **Q.** And you have already testified that you don't think  
16 he had REM disorder?

17 **A.** Correct.

18 **Q.** Just -- you weren't sure which one it was, so I'm  
19 just showing this. Does this refresh your memory?

06:55:53

20 **A.** Yes.

21 **Q.** Okay. Yeah. But after this test was done, in your  
22 October report you're still relying on Dr. York's  
23 findings, aren't you?

24 **A.** I am relying -- I'm sorry. Say that again. When?

06:56:04

25 **Q.** In your October report that was submitted -- October

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 29th in this hearing, you're still relying on Dr. York's  
2 report even though this sleep study contradicts her  
3 findings?

06:56:24

4 **A.** It contradicts -- it doesn't contradict her  
5 neuropsychological findings. It simply contradicts what  
6 she thought was going on with Mr. Brockman with regard to  
7 his sleep. And by my last report, I was relying mostly on  
8 my findings and his more recent history.

06:56:45

9 **Q.** I'm sorry. I misspoke. You're correct. Her  
10 diagnosis of Lewy body dementia. Isn't that what she  
11 says?

12 **A.** Yes.

13 **Q.** In each of her reports?

14 **A.** Yes.

06:56:52

15 **Q.** And then we get the sleep study which says he doesn't  
16 have REM disorder, which is a hallmark of Lewy body  
17 disease. Right?

18 **A.** It's an important feature.

06:57:04

19 **Q.** So, that comes out in August. Your report comes out  
20 in October. But you still cite Dr. York's report in your  
21 report; isn't that right?

22 **A.** Yes. But I don't agree with her -- with her final  
23 diagnosis.

24 **Q.** Right. You still cite her report?

06:57:23

25 **A.** Yes.

KATHY MILLER, RMR, CRR - kathy@millers-reporting.com



THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. And you use it as -- you use it as support for your  
2 conclusion that she -- that Dr. Brockman -- Mr. Brockman  
3 has dementia, because of her testing?

4 A. Sorry?

06:57:34

5 Q. Because of her testing.

6 A. If there were no such person as Dr. York, I would  
7 have still -- and that testing, based upon the data that I  
8 saw from Mr. Brockman, especially in -- in 2021, this year  
9 especially, in addition to the neuroimaging findings,

06:57:51

10 other information --

11 Q. Uh-huh.

12 A. -- his performance on testing, I would make the same  
13 diagnosis regardless of what Dr. York said.

14 Q. So -- I understand that. So, we can put Dr. York  
15 aside. Her diagnosis is wrong.

06:58:01

16 A. Her diagnosis is incorrect.

17 Q. And she didn't consider real world evidence that was  
18 occurring contemporaneous with her evaluations of  
19 Mr. Brockman. Right?

06:58:11

20 A. Yes.

21 Q. Okay. So, let me ask about your report.

22 In your report, both of them, you also  
23 don't consider real world evidence, do you? Let me  
24 rephrase that. I'm sorry. You consider some real world  
25 evidence. You don't consider contradictory real world

06:58:25

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 evidence?

2 **A.** For example?

3 **Q.** For example, the deposition in 2019 -- in January

4 2019. For example, the deposition September 2019, the

06:58:39

5 speech in November 2019 that Mr. Brockman gave to his

6 assembled employees in 2018. All of this activity which

7 is contradictory to a finding of mild or moderate

8 dementia, it's not referenced in your report, is it?

9 **A.** It was two years before that time. His -- his

06:58:56

10 functioning in 2021 was very different from the years

11 before that.

12 **Q.** So, do you think he had dementia in 2019?

13 **A.** I believe he had the -- the early signs of dementia.

14 **Q.** And you -- but you don't talk about that in your --

06:59:12

15 Well, let me rephrase that question.

16 In your report, you don't consider or you

17 don't comment -- I should say you don't comment on these

18 depositions and this other activity in 2019 as impacting

19 your evaluation?

06:59:26

20 **A.** Correct.

21 **Q.** Okay. So, I just have a few more questions I want to

22 ask about your reports.

23 Your first report, which is Exhibit 19,

24 Defense Exhibit 19, I think you have there -- I ask you to

06:59:51

25 turn to Page 72.

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 **A.** I'm sorry. This is the first one?

2 **Q.** Yeah, the first one. Yes. Page 72.

3 **A.** Page 72. Okay.

4 **Q.** So, you're -- you're talking about -- this is

07:00:22 5 Question 6 counsel asked you about --

6 **A.** Yes.

7 **Q.** -- is he malingering? And you have that first bullet  
8 point there. Do you see that?

9 **A.** Yes.

07:00:36 10 **Q.** One example was that "The diagnosis of malingering is  
11 being asserted" -- Well, let me just ask you a question.

12 You dismissed the malingering or the  
13 accusation of malingering in that first bullet point  
14 because you believe that Mr. Brockman did not learn of the  
07:00:53 15 criminal investigation until September 2018. Isn't that  
16 what that says?

17 **A.** So, my impression was -- from Dr. Dietz's report was  
18 that Mr. Brockman began to malingering cognitive impairments  
19 after the raid of Mr. Tamine's home in Bermuda.

07:01:24 20 **Q.** And see where it says "However"?

21 **A.** Yes.

22 **Q.** "However, evidence of the decline in Mr. Brockman's  
23 functioning observed by those around him predates the raid  
24 in 2018."

07:01:40 25 **A.** Yes.

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Q. So, isn't that presupposing that Mr. Brockman didn't  
2 know about the criminal investigation in 2018?

3 MR. LOONAM: Argumentative, asked and answered.  
4 He said he --

07:01:49

5 THE COURT: Objection overruled.

6 BY MR. SMITH:

7 Q. Doesn't that presuppose that Mr. Brockman did not  
8 know about the criminal case until 2018?

9 A. Not necessarily.

07:01:56

10 Q. So, when do you think Mr. Brockman learned about the  
11 criminal case?

12 A. I -- from what I understand, he -- the -- the point  
13 that I was trying to make, which is my impression of  
14 Dr. Dietz's report, was that Dr. Dietz indicated that the  
15 malingerer of impairments began following the raid on  
16 Evatt Tamine's home.

07:02:19

17 Q. And that was part of the criminal case?

18 A. Yes.

19 Q. So, you are saying, well, that's not valid because he  
20 had -- what you're saying in that bullet point is that  
21 Mr. Brockman had evidence of or reported evidence of  
22 cognitive problems before the raid on Mr. Tamine. Isn't  
23 that what you're saying?

07:02:31

24 A. Yes.

07:02:43

25 Q. So, wouldn't that imply that Mr. Brockman -- to

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 dismiss what Dr. Dietz says, you're implying that  
2 Mr. Brockman didn't know about the criminal case before  
3 the raid on Mr. Tamine's home?

07:03:00

4 **A.** My understanding is that he -- that he was aware of  
5 some investigation at some point before that.

6 **Q.** So, what's your understanding?

7 **A.** I don't --

8 **Q.** So -- well, what is your understanding of when  
9 Mr. Brockman learned of the criminal case?

07:03:12

10 **A.** Sometime before -- sometime before the raid on  
11 Mr. Tamine's home.

12 **Q.** And why is that important? Isn't it -- Well, let me  
13 ask it this way.

07:03:27

14 Dr. Guilmette, isn't part of this analysis  
15 that you have done in your report here is that -- the  
16 conclusions you want the reader to draw is that  
17 Mr. Brockman is not malingering because -- he's not  
18 malingering because he didn't -- he was reporting symptoms  
19 earlier than the criminal case; therefore, his symptoms  
20 are not coming -- the impetus is not the criminal case?

07:03:48

21 **A.** He was reporting cognitive symptoms as far back as  
22 2004.

23 **Q.** Okay. Okay. Let's look at the -- let's look at the  
24 other report, the October report. Defense Exhibit 22,  
25 Page 39. And I am going to put it up on the screen.

07:04:13

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 Actually -- I'm sorry -- it's Page 40.

2 Do you see that, Dr. Guilmette?

3 **A.** Yes.

4 **Q.** And this is sort of the conclusory part of your  
07:04:56 5 report in October?

6 **A.** Yes.

7 **Q.** So -- and you say, if I can point my pen to it:

8 "Across Mr. Brockman's many neuropsychological  
9 evaluations, 23 PVTs, the validity tests, were

07:05:14 10 administered, and of these 17 scored in the valid range?

11 **A.** Yes.

12 **Q.** Which means he failed six validity tests. Right?

13 **A.** Yes.

14 **Q.** And we have already looked at the literature from the  
07:05:25 15 American Academy of Neuropsychologist's consensus. A "2"  
16 indicates invalid scores?

17 **A.** Not in cases of dementia, also not in cases  
18 especially with the Green test in which a Genuine Memory  
19 Impairment Profile is produced. Those are not -- Yes, his  
07:05:45 20 scores fell below the cutoff. That doesn't mean that he  
21 actually failed the test.

22 **Q.** That's because, in your -- in your -- Well, he failed  
23 six tests. Right? That's what you say in your report?

24 **A.** Yeah, that he -- he received failing marks, so to  
07:06:03 25 speak. He fell below the cutoff for those tests but that,

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 again, he generated a Genuine Memory Impairment Profile.

2 Q. On some -- on some of the tests?

3 A. On all of them.

4 Q. Well, some of that is your interpretation, is it not?

07:06:21

5 I mean, we just went through one, the GGVMT. Is that the  
6 right way to say it?

7 A. I don't know.

8 Q. The Green -- the one that we did the calculation.

9 That was not a Genuine Memory Impairment Profile?

07:06:34

10 A. Well, again, however, I would rely on the advanced  
11 interpretation -- interpretation of that.

12 Q. So, is there any way, in your assessment,  
13 Dr. Guilmette, that Mr. Brockman could fail a validity  
14 test?

07:06:47

15 A. Yes.

16 Q. It doesn't seem so.

17 A. It is possible. The -- the scores that he -- On the  
18 Rey 15-Item Test, again, the -- the marker of invalidity  
19 that -- that he passed three times out of three times, he  
20 never failed that. The other measures, in which he -- he  
21 performed within the acceptable limits, yeah, it -- he  
22 certainly could have failed.

07:07:06

23 Q. But, in your opinion, he did not?

24 A. My opinion is he -- he failed the ones that I

07:07:25

25 mentioned in my report and passed the ones that he

THOMAS GUILMETTE, Ph.D. - CROSS BY MR. SMITH

1 mentioned -- that I mentioned in my report.

2 Q. But even though he failed some validity tests, you  
3 are still saying your opinion is the cognitive testing is  
4 correct and that Mr. Brockman, when you test him, has  
07:07:39 5 moderate to severe -- was it moderate to severe -- or mild  
6 to moderate dementia?

7 A. Yes.

8 Q. And a lot of that test interpretation is your  
9 judgment?

07:07:48 10 A. Yes.

11 Q. Okay.

12 MR. SMITH: No further questions.

13 THE COURT: We are going to have to cut it off  
14 for the evening.

07:07:55 15 MR. LOONAM: I have --

16 THE COURT: Do you have --

17 MR. LOONAM: I will do a quick redirect so that  
18 this witness can get on a plane tomorrow morning --

19 THE COURT: Okay.

07:08:05 20 MR. LOONAM: -- if that's okay with Your Honor.  
21 I'll be short.

22 THE COURT: Sure. That will be great. We  
23 can't stay past 7:30.

24 MR. LOONAM: Oh. No. No. I will -- I will  
07:08:16 25 limit myself. Self control, Your Honor.

KATHY MILLER, RMR, CRR - kathy@millers-reporting.com



THOMAS GUILMETTE, Ph.D. - REDIRECT BY MR. LOONAM

1 THE COURT: Okay. Well, I am not -- I'm just  
2 telling you sort of the outer bounds, because, as I said,  
3 we have got issues with power and other things that there  
4 is nothing I can do about it.

07:08:29

5 MR. LOONAM: All right.

6 **REDIRECT EXAMINATION**

7 BY MR. LOONAM:

8 Q. There was testimony about two being sort of the  
9 cutoff for failed validity tests.

07:08:41

10 How many validity tests are typically  
11 administered in a course of testing?

12 A. In a forensic evaluation?

13 Q. Yes.

14 A. Oh, six-ish.

07:08:51

15 Q. Six or seven?

16 A. Yes.

17 Q. So, if you do six or seven and if you fail two, the  
18 cutoff is -- well, that's a -- that's an indication of  
19 exaggeration?

07:09:00

20 A. Yes.

21 Q. Does it -- does it matter if -- You know, how many  
22 validity tests did Mr. Brockman take?

23 A. I think 23 is what was -- the number that I  
24 calculated.

07:09:12

25 Q. Yeah. And, so, might that impact, you know, the

THOMAS GUILMETTE, Ph.D. - REDIRECT BY MR. LOONAM

1 number of tests that -- that he could fail and -- Speak to  
2 that.

07:09:28

3 **A.** Yes. So, there is -- there is certainly thinking in  
4 the field that the more PVTs you give, the more likely you  
5 are to find false positives. If the accepted range,  
6 generally speaking, is two out of seven failures, then  
7 that means four out of 14, six out of 21 failures, would  
8 more likely denote an invalid profile.

07:09:46

9 **Q.** Okay. You were questioned about -- about referencing  
10 Dr. York in your report. Did Dr. Denney reference  
11 Dr. York in his report?

12 **A.** Yes.

07:10:08

13 **Q.** Now, there was discussion of the timeline and -- in  
14 2018 and -- and you testified that, well, in Dr. Dietz's  
15 report he put the sort of demarcation line at a search in  
16 Bermuda and that, in Dr. Dietz's report, he suggested that  
17 Mr. Brockman began malingering after that search in  
18 Bermuda. Correct?

19 **A.** That was my impression, yes.

07:10:22

20 **Q.** And you testified that -- Oh, yes. I am going to  
21 show you what is in evidence as Government's Exhibit 153.  
22 These are health notes that were provided by a Dr. Lisse.

23 **A.** Yes.

24 **Q.** Do you know who Dr. Lisse is?

07:10:43

25 **A.** Yes.

THOMAS GUILMETTE, Ph.D. - REDIRECT BY MR. LOONAM

07:11:04

07:11:22

07:11:38

07:11:46

07:12:02

1 Q. Okay. So, these notes are from 2015, and they  
2 indicate, "Unfortunately, for most of the year I felt like  
3 something" -- "I felt like sometimes 40 percent of my  
4 energy was gone. Something is really wrong with me." And  
5 then under "Mental Processes Including Memory" -- this is  
6 on Page 4 of 9 of the document -- "Mental processes not as  
7 good but no further serious decline. Memory continues to  
8 get poorer, especially with names of people that I know  
9 well and should be remembered easily. In a new weird  
10 phenomena, names that I ought to remember, like one of our  
11 maids and a restaurant close by the house that I have been  
12 to 20 times or more, yet have had real problems  
13 remembering these two names. Ability to work long hours  
14 effectively is now pretty much as good as ever now."

15 All right. Did you review notes like  
16 this?

17 A. Yes.

18 Q. Yes?

19 A. Yes, dating back to 2004.

20 Q. And sometimes these notes repeat themselves?

21 A. Yes.

22 Q. And the fact that this was found in Dr. Lisse's files  
23 from 2015, does that give you another piece of data with  
24 respect to evaluating whether Mr. Brockman is malingering?

25 A. Yes. This -- this certainly suggests that he had

THOMAS GUILMETTE, Ph.D. - REDIRECT BY MR. LOONAM

1 subjective cognitive complaints, well, in 2015.

2 Q. And what might that process be that he is observing?

3 A. He might be experiencing the very early signs of a  
4 cognitive decline associated with dementia.

07:12:18

5 Q. Okay. And I am going to ask you about the last line  
6 here, "Ability to work long hours effectively is now  
7 pretty much as good as ever now." What does that tell you  
8 about whether this document is being created as some sort  
9 of grand conspiracy to leave a paper trail to malingering

07:12:34

10 years down the line in case a need arises?

11 A. Yeah. Well, so, that -- that would certainly suggest  
12 that there was no attempt there to make himself look worse  
13 than he actually was.

07:12:48

14 THE COURT: Counsel, I don't mean to interrupt,  
15 but just a quick question. How long was Mr. Brockman seen  
16 by Dr. Lisse? Was there testimony -- I know at least 2015,  
17 but how long was he Mr. Brockman's PCP?

18 MR. LOONAM: I'd have to go back and look at  
19 the testimony.

07:13:04

20 MR. BOURGET: I think the testimony is from  
21 2015 to 2018.

22 THE COURT: And who was before that?

23 MR. LOONAM: Obenour.

24 THE COURT: Obenour?

07:13:14

25 MR. LOONAM: Dr. Obenour.

THOMAS GUILMETTE, Ph.D. - REDIRECT BY MR. LOONAM

1 THE COURT: And do we have any records from  
2 him?

07:13:24

3 MR. LOONAM: I think -- are those the records  
4 we turned over? We got those records when Dr. Obenour  
5 retired.

07:13:36

6 MR. MAGNANI: I don't think that is right. So,  
7 yeah, my understanding of it, Your Honor, is that when  
8 Dr. Ryan Darby, who was the first witness who testified,  
9 when Mr. Brockman brought up that he had medical records in  
10 his house, he told Dr. Darby, I had this doctor,  
11 Dr. Obenour, and when he retired he didn't want to digitize  
12 his records. So I persuaded him.

07:13:49

13 Basically the representation of  
14 Mr. Brockman is that the box of records that Jones Day  
15 produced to us after the Darby interview are the Obenour  
16 records.

07:14:01

17 MR. LOONAM: No. We're on the same page. We  
18 are in agreement. So that is our understanding, too, that  
19 Mr. Brockman had these records from Dr. Obenour. When we  
20 learned of them, we turned them over.

21 THE COURT: Yeah.

22 MR. LOONAM: But, yeah, these records were in  
23 Mr. Brockman's possession, if that's the government's  
24 point.

07:14:08

25 MR. MAGNANI: Nobody got any records from

THOMAS GUILMETTE, Ph.D. - REDIRECT BY MR. LOONAM

1 Dr. Obenour.

2 MR. LOONAM: He was long retired.

3 THE COURT: I just wanted to kind of figure out  
4 the sequence of events of when Mr. Brockman changed PCPs.

07:14:19 5 It was Dr. Obenour in 2015. It was Dr. Lisse. And then  
6 basically, September, or 2018 he switches --

7 MR. LOONAM: To Pool.

8 THE COURT: -- to the doctor we heard today.

9 MR. LOONAM: That is correct. So this would be  
07:14:34 10 contemporaneous when he changes doctors to Dr. Lisse.

11 THE COURT: Okay. Got it. I didn't mean to  
12 interrupt. I just wanted to make sure I understand the  
13 sequence.

14 MR. LOONAM: Not at all, sir.

07:14:47 15 BY MR. LOONAM:

16 Q. And there was -- there seemed to be a lot of  
17 questions about, Well, if you scored the test that way,  
18 you presupposed that the defendant had dementia, or -- and  
19 so the questions flowing from that thinking. Do you  
07:15:07 20 recall those questions?

21 A. Yes.

22 Q. Are you aware that the government's own experts,  
23 Dr. Dietz and Dr. Darby, have opined that it is reasonable  
24 that the defendant's condition has progressed to dementia?

07:15:23 25 A. Yes.

THOMAS GUILMETTE, Ph.D. - REDIRECT BY MR. LOONAM

1 MR. LOONAM: No further questions.

2 THE COURT: Okay. Mr. Smith?

3 MR. SMITH: No. Nothing further, Your Honor.

4 THE COURT: May this witness be excused?

07:15:34

5 MR. VARNADO: Yes, Your Honor.

6 THE COURT: Okay. Great. Doctor, thank you so  
7 much.

8 THE WITNESS: Thank you, Your Honor.

07:15:42

9 THE COURT: Okay. Everyone, we will call it a  
10 night. We will start again at 8:30 tomorrow. I mean, I'm  
11 sorry, yes, 8:30 tomorrow, and we will try to finish up  
12 around the same time tomorrow night.

13 MR. SMITH: Very good.

07:15:56

14 THE COURT: If we need to, I can -- well, if we  
15 need to, we will have to come back on Friday. I mean,  
16 that's all we can do. I mean, we have got to keep going.  
17 So if you guys can wrap it up tomorrow, great. If you  
18 can't, just be prepared to come back on Friday.

07:16:12

19 MR. SMITH: The only thing I want to bring to  
20 the Court's attention -- I don't know if the Court realizes  
21 -- we're not from here. We're all from Washington DC, so  
22 that is going to be very difficult for us to fly in Friday  
23 morning.

24 THE COURT: Okay. Well --

07:16:23

25 MR. LOONAM: We are prepared --

THOMAS GUILMETTE, Ph.D. - REDIRECT BY MR. LOONAM

1 THE COURT: I'm sorry. I forgot. Tomorrow is  
2 Tuesday. The days are running together. So we have got  
3 Wednesday. Sorry. So we have got two more days. I  
4 apologize. So if we can't wrap it up by Wednesday at 7:00,  
5 we will have to --

07:16:37

6 MR. VARNADO: We will be wrapped up by then.

7 MR. LOONAM: Yeah, we're available at the  
8 Court's convenience. We're prepared to work, again, long  
9 hours tomorrow to see if we can wrap this up. We are

07:16:50

10 hopeful that we can, but we are available Wednesday, too.

11 THE COURT: Okay. Great. Sorry. Lost track  
12 of days. I thought we were finishing up on Wednesday, so  
13 we have got time.

14 Okay. Well, let's start again at 8:30  
15 tomorrow morning. We will keep pushing forward. Have a  
16 good night, everyone.

07:16:59

17 MR. LOONAM: Thank you, sir.

18 THE CASE MANAGER: All rise.

19 (Recessed at 7:16 p.m.)

20 COURT REPORTER'S CERTIFICATE

21 I, Kathleen K. Miller, certify that the foregoing is a  
22 correct transcript from the record of proceedings in the  
23 above-entitled matter.

24 DATE: 11/26/2021

/s/ Kathleen K Miller

25

Kathleen K Miller, RPR, RMR, CRR



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